

1-1-1991

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Recommended Citation

Gregory S. Sergienko and Maureen B. Callahan, *Full Faith and Credit, Choice of Laws, and Extraterritorial Regulation of Corporate Transactions*, 18 HASTINGS CONST. L.Q. 325 (1991).

Available at: https://repository.uchastings.edu/hastings_constitutional_law_quarterly/vol18/iss2/4

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Full Faith and Credit, Choice of Laws, and Extraterritorial Regulation of Corporate Transactions

By GREGORY S. SERGIENKO* and MAUREEN B. CALLAHAN**

Introduction

In a federal system in which each state may enact laws providing for the chartering and governance of corporations and in which corporations can and do conduct business in more than one state, several states may claim an interest in regulating the conduct of a given corporation. The enactment of state laws that are intended to restrict hostile corporate takeovers and that purport to extend to foreign corporations¹ is one example of this phenomenon.² "Typically, any of a number of jurisdictional links might trigger the application of such an anti-takeover statute: the target's being incorporated in the state, its having a principal office or major operations in the state, or the existence of a significant number of target shareholders in the state."³ The Supreme Court of Delaware, the state where most large companies incorporate, has held that it may vio-

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1. See, e.g., WASH. REV. CODE §§ 23B.19.010-.050 (1989).

2. Extraterritorial legislation regarding corporate activity is not limited to the regulation of takeovers. See, e.g., *Western Air Lines, Inc. v. Sobieski*, 191 Cal. App. 2d 399, 12 Cal. Rptr. 719 (1961) (applying California law to Delaware corporation to prevent corporation from eliminating cumulative voting); *Newmark v. C & C Super Corp.*, 4 Misc. 2d 693, 159 N.Y.S.2d 77 (applying New York's inspection law to a Delaware corporation), *modified on other grounds*, 3 A.D.2d 823, 160 N.Y.S.2d 936, *aff'd mem.*, 3 N.Y.2d 790, 143 N.E.2d 796, 164 N.Y.S.2d 42 (1957); *Gresov v. Shattuck Denn Mining Corp.*, 29 Misc. 2d 324, 215 N.Y.S.2d 98 (1961) (applying New York's inspection law to a Delaware corporation and staying a shareholder's meeting in Arizona pending the inspection); CAL. CORP. CODE § 25103 (West Supp. 1991) (exempting certain transactions from review by the California Commissioner of Corporations unless 25% of the shareholders of the corporation have California addresses); N.Y. BUS. CORP. LAW §§ 1306, 1315-1320 (McKinney 1986) (imposing disclosure requirements on foreign corporations and setting forth liability rules governing them).

3. R. CLARK, *CORPORATE LAW* 569 (1986).

late the Commerce Clause⁴ for a state to regulate a corporation organized under the laws of another state.⁵ Other states' extraterritorial efforts to limit the rights of shareholders of Delaware corporations potentially conflict with Delaware law, which allows shareholders, even those who acquire the stock of a company as a result of a hostile takeover, complete control over the acquired corporation.⁶

The stage is thus set for a conflict. A principled resolution of this conflict is essential so that the parties to corporate transactions can predict which laws govern their behavior. How is this conflict to be resolved?

The most appropriate federal constitutional provision for resolving such conflicts is the Full Faith and Credit Clause.⁷ The United States Supreme Court has recently revived the use of the Clause to require states to apply other states' legislation and common law.⁸ Past scholar-

4. U.S. CONST. art. I, § 8, cl. 3.

5. *McDermott Inc. v. Lewis*, 531 A.2d 206 (Del. 1987). The court held that applying DEL. CODE ANN. tit. 8, § 160(c) (1983), which limits the voting power of capital stock under some circumstances, to a foreign corporation would subject the corporation to the laws of Delaware in violation of the Commerce Clause. 531 A.2d at 217-19. In *McDermott*, the Delaware court applied Panamanian law to permit a subsidiary to vote shares of its parent's stock. *Id.* at 209. In contrast, *Norlin Corp. v. Rooney, Pace Inc.*, 744 F.2d 255, 263-64 (2d Cir. 1984), applied New York law, rather than Panamanian law, to prohibit a subsidiary from voting stock in its parent because Panama had no "legitimate and substantial interest" in the transaction.

6. The conflicting assertions of jurisdiction are accompanied by conflicting substantive law. Extraterritorial efforts by other states to limit hostile takeovers by restricting the rights of shareholders of Delaware corporations to control the assets of those corporations potentially conflict with Delaware law, which allows shareholders more control over the acquired corporation. In addition to the exceptions most states provide for acquisitions made with the prior approval of the board, *see* DEL. CODE ANN. tit. 8, § 203(a)(3) (1983), Delaware law also does not restrict the rights of those shareholders who hold 85 percent or more of the stock of the corporation. *See* DEL. CODE ANN. tit. 8, § 203(a)(2) (1983). Thus, Delaware law inhibits coercive tender offers by limiting abuse of minority shareholders, but allows those who acquire at least 85 percent of the stock unrestricted control.

7. U.S. CONST. art. IV, § 1. "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." *Id.*

8. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985); *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981) (plurality opinion); *Rush v. Savchuk*, 444 U.S. 320 (1980). In earlier years, the Supreme Court enforced the Full Faith and Credit Clause in cases not involving recognition of judgments. *See generally* Dodd, *The Power of the Supreme Court to Review State Decisions in the Field of Conflict of Laws*, 39 HARV. L. REV. 533, 562 (1926).

The Due Process Clause also imposes limits on the states' abilities to make arbitrary choices of law because the application of unexpected rules of law may unfairly disappoint the parties' reasonable expectations about what law would govern. *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930). The Supreme Court, over the objections of Justice Stevens, has overruled past cases, *e.g.*, *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145, 154 (1932), that held that the

ship says little about the implications of the Full Faith and Credit Clause in such cases.⁹ Most discussions of the constitutionality of state regulation of hostile takeovers focus on the Commerce and Supremacy Clauses and do not consider the Full Faith and Credit Clause.¹⁰

Full Faith and Credit Clause provides more protection than the Due Process Clause. *Allstate Ins. Co. v. Hague*, 449 U.S. at 308 n.10 (citing cases); *id.* at 332 (Powell, J., dissenting) (accepting plurality's analysis). *Cf. id.* at 321-22 (Stevens, J., concurring in the judgment) (recognizing that "both this Court's analysis of choice-of-law questions and scholarly criticism of these decisions have treated these two inquiries [under the Due Process and Full Faith and Credit Clauses] as though they were indistinguishable" (citations omitted)).

The Court's assumption that the Due Process Clause is coextensive with the Full Faith and Credit Clause may be questioned. Due process rights are waivable. *See D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185 (1972). If the Due Process Clause were the sole source of rights to governing law, one would expect that contractual provisions specifying a choice of law would be binding. Courts do not follow this analysis. For example, in a loan contract usurious in the borrower's domicile but lawful in the lender's domicile, courts frequently refused to honor a choice of the law of the lender's domicile. *See National Mut. Bldg. & Loan Ass'n v. Braham*, 193 U.S. 635, 647 (1904) (permitting, under the Full Faith and Credit Clause, the application of the usury law of the borrower to a contract stipulated to be governed by another law); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 203 (1971); *id.* comment e, illustration 8 (a contractual provision choosing the law of the state of incorporation of a lender does not validate an otherwise usurious contract); Note, *Effectiveness of Choice-of-Law Clauses in Contract Conflicts of Law: Party Autonomy or Objective Determination?*, 82 COLUM. L. REV. 1659 (1982); Comment, *Usury in the Conflict of Laws: The Doctrine of the Lex Debitoris*, 55 CALIF. L. REV. 123 (1967). Indeed, in other areas the Court upheld the use of a law other than the one chosen by the parties. In *Andrews v. Andrews*, 188 U.S. 14 (1903), the Court upheld a state law prohibiting the parties from agreeing to a divorce outside their marital domicile. In *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 504-05 (1939), the Court allowed California to apply its worker's compensation law despite the parties' agreement to apply Massachusetts law. The Court approved this decision in *Nevada v. Hall*, 440 U.S. 410, 422-24 (1979). *Cf. Williams v. North Carolina*, 325 U.S. 226, 230 (1945):

But those not parties to a litigation ought not to be foreclosed by the interested actions of others; especially not a State which is concerned with the vindication of its own social policy and has no means, certainly no effective means, to protect that interest against the selfish action of those outside its borders.

These results seem inexplicable under the Due Process Clause but obvious under the Full Faith and Credit Clause because of the interest of one state in protecting or regulating its own citizens.

Whatever the ultimate result of this dispute, the analysis of conflicts between different states' corporate laws suggested in this Article will not be affected. The planning functions implicated by conflicting regulations fit into core due process concerns, so the problems addressed by this Article do not depend on an extension of the Full Faith and Credit Clause beyond the scope of the Due Process Clause.

9. The only recent discussion is Buxbaum, *The Threatened Constitutionalization of the Internal Affairs Doctrine in Corporation Law*, 75 CALIF. L. REV. 29 (1987), which notes the difficulty raised in this Article, but does not suggest any particular solution.

10. *See, e.g., Callahan & Burman, The Validity of Washington's Antitakeover Act Under the Commerce and Supremacy Clauses*, 13 U. PUGET SOUND L. REV. 41 (1989); Fischel, *From MITE to CTS: State Anti-takeover Statutes, the Williams Act, the Commerce Clause, and Insider Trading*, 1987 SUP. CT. REV. 47; Note, *The Constitutionality of Second Generation Take-*

Even Supreme Court precedent does not provide a workable solution to the conflict. The Court has recognized that the full faith and credit requirements extend to state substantive law.¹¹ Despite this recognition, the Court's assumption that the power to establish this law—jurisdiction to prescribe¹²—is based on the presence within the state of the things the state seeks to regulate, renders the Court's analyses in the area of conflict of laws inapposite. This leaves the court with no basis for deciding which state's laws govern: (1) the state of incorporation, which has the power over the existence of the corporate entity, or (2) the state where the physical assets and employees of the corporation are located, which would ordinarily control the corporation's relationships with these assets and employees.¹³ Moreover, the Court's rejection of past precedents holding that the Full Faith and Credit Clause provided stronger protection than the Due Process Clause may indicate that the Court is unwilling to resolve these conflicts.¹⁴

In this Article, we first address the shortcomings of the traditional power analysis. We then propose an alternative means of establishing constitutional standards for legislative assertions of jurisdiction over transactions involving substantial amounts of planning—the universality requirement.

Our proposal incorporates a presumption in favor of the internal

over *Statutes*, 73 VA. L. REV. 203 (1987) (examining whether anti-takeover legislation is prohibited by the Commerce Clause or preempted by the Williams Act).

11. "[F]or a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Allstate Ins. Co. v. Hague*, 449 U.S. at 312-13 (Brennan, J., plurality opinion), *quoted in Phillips Petroleum*, 472 U.S. at 818.

12. "Jurisdiction to prescribe" is the state's power "to make its law applicable to the activities, relations, or status of persons, or the interests of persons in things." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 401(a) (1987). While the Restatement deals with foreign relations law, the definition of jurisdiction to prescribe applies whenever multiple jurisdictions seek to prescribe the rules governing a transaction or occurrence.

13. *E.g.*, *Blackstone v. Miller*, 188 U.S. 189 (1903) (allowing internally inconsistent assertion of jurisdiction to tax), *overruled by Farmers Loan & Trust Co. v. Minnesota*, 280 U.S. 204, 209 (1930); *Kidd v. Alabama*, 188 U.S. 730, 732 (1903) (Holmes, J.) (double taxation of intangibles by two different states was permissible because no state's theory could be shown to be repugnant to the Federal Constitution).

14. *Compare Phillips Petroleum*, 472 U.S. at 818 (plurality opinion) (applying the same test to determine compliance with both the Full Faith and Credit and Due Process Clauses) *with Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145, 154 (1932) (Brandeis, J.) (finding a violation of the Full Faith and Credit Clause, but not of the Due Process Clause) *and Phillips Petroleum*, 472 U.S. at 824 (Stevens, J., concurring) (favoring differing analyses for full faith and credit and due process inquiries).

affairs doctrine,¹⁵ so that states may not regulate relations among or between foreign corporations and their shareholders, officers, directors, and assets. This presumption could be overcome if the state attempting to assert jurisdiction over foreign corporations recognizes other states' assertions of jurisdiction over its own corporations on similar facts. For example, State *A* could assert jurisdiction to regulate a foreign corporation based on the presence of a majority of the corporation's assets within State *A* so long as it recognized State *B*'s power to regulate corporations incorporated in State *A* with most of their assets in State *B*.

Conversely, a state could not claim jurisdiction on the basis of both (1) the state of incorporation and (2) the presence within the state of more than fifty percent of the assets. To do so could lead to two states having the same legislation and asserting jurisdiction over the same corporation, because a corporation could be incorporated under one state's laws, but have most of its assets in another.

Under most circumstances, when one state's assertion of jurisdiction is not intended to preclude the laws of another state, the law is valid. For example, a state could require reporting of corporations on the basis of presence of property, presence of shareholders, and state of incorporation. A corporation could satisfy simultaneously the requirements of two such states. Because both states' obligations could be satisfied without interfering with the principles of either state, such schemes do not, under our proposal, violate the Full Faith and Credit Clause.

This test supplements and does not displace the conventional full faith and credit analysis. A state has "no interest in protecting nonresident shareholders of nonresident corporations."¹⁶ The absence of any interest means that its claim to regulate on the basis of protecting nonresident shareholders must fail, even without regard to competing interests.

15. The internal affairs doctrine is a conflict of laws principle which recognizes that only one State should have the authority to regulate a corporation's internal affairs—matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders—because otherwise a corporation could be faced with conflicting demands.

Edgar v. MITE Corp., 457 U.S. 624, 645 (1982) (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 302 comment b (1971)).

16. CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 93 (1987) (emphasis omitted).

I. The Traditional Approach: Jurisdiction To Prescribe Based on Power

A. The Development of the Power Analysis in Supreme Court Case Law

Initially, courts analyzed jurisdiction to adjudicate¹⁷ in the same way that they analyzed jurisdiction to prescribe: what state had power to control the situation? Control over people or things at the time of the suit provided jurisdiction to adjudicate.¹⁸ Likewise, control over people or things at the time of the activities giving rise to the obligation sought to be enforced provided jurisdiction to prescribe.

Courts based jurisdiction to prescribe on two things: on the presence of persons or things and on the permanent residence or domicile of the parties sought to be affected.¹⁹ As to the first, Justice Story wrote in his treatise on conflict of laws, "The first and most general maxim or proposition is that, which has been already adverted to, that every nation possesses an exclusive sovereignty and jurisdiction within its own territory."²⁰ Cases like *Pennoyer v. Neff*, which held that "every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory,"²¹ were based on Story's theories. Similarly, the Court upheld power to impose a transfer tax based on the debtor's domicile: "Power over the person of the debtor confers jurisdiction, we repeat."²² This power could be exercised even over a transitory defendant for the purposes of a transaction with no connection with the forum other than the transitory presence of the defendant.²³

In addition, jurisdiction to prescribe could be based on residence or domicile. This resulted from the adaptation of the rule that a king had sovereignty over his subjects.

17. The term "jurisdiction to adjudicate" is taken from von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966).

18. *Harris v. Balk*, 198 U.S. 215 (1905), *overruled by* *Shaffer v. Heitner*, 433 U.S. 186 (1977). See generally von Mehren & Trautman, *supra* note 17. Traditionally, jurisdiction based on the domicile or presence of persons was known as jurisdiction in personam while jurisdiction based on the presence of the property within the territory of the forum was known as jurisdiction in rem. *Hanson v. Denckla*, 357 U.S. 235, 246 & n.12 (1958).

19. See generally *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877); *Shaffer v. Heitner*, 433 U.S. 186, 196-206 (1977).

20. J. STORY, COMMENTARY ON THE CONFLICT OF LAWS § 18, at 26 (5th ed. 1857).

21. 95 U.S. 714, 722 (1877). *Pennoyer* also adopted the rules governing power to adjudicate among nations as the appropriate test for allocating power to adjudicate among the states of the United States. *Id.*

22. *Blackstone v. Miller*, 188 U.S. 189, 206 (1903), *overruled by* *Farmers Loan & Trust Co. v. Minnesota*, 280 U.S. 204 (1930).

23. See *New York v. O'Neill*, 359 U.S. 1, 8-9 (1959) (upholding Florida's power to order a witness to testify in New York based on his presence within Florida).

Every nation has hitherto assumed it as clear, that it possesses the right to regulate and govern its own native born subjects everywhere; and consequently, that its laws extend to, and bind such subjects at all times, and in all places. This is commonly adduced as a consequence of what is called natural allegiance, that is, of allegiance to the government of the territory of a man's birth.²⁴

While Story's treatise also stated, "Another maxim, or proposition, is, that no State or nation can, by its laws, *directly* affect, or bind property out of its own territory, or bind persons not resident therein, whether they are natural born subjects or others,"²⁵ indirect regulation was certainly allowed. The Supreme Court applied this rule in such areas as criminal law,²⁶ ordinary civil law,²⁷ taxation,²⁸ and divorce.²⁹

The exercise of jurisdiction to prescribe based on power over the territory in which the critical acts took place was expressed in rules such as *lex loci contractus*.³⁰ This rule led to the development of the vested rights theory, under which rights acquired at the situs of the contract continued wherever the parties went.³¹ Similarly, under longstanding conflict of laws principles, the place of the wrong governed liability in tort.³² This was so even though the place was related only by chance to

24. J. STORY, *supra* note 20, § 21, at 29.

25. *Id.* § 20, at 28 (emphasis added).

26. *See, e.g., Skiriotes v. Florida*, 313 U.S. 69, 77-79 (1941) (state criminal sanctions may be imposed on the state's citizens for acts committed on the high seas).

27. *See, e.g., Milliken v. Meyer*, 311 U.S. 457, 462-63 (1940) (upholding extraterritorial service of process based on domicile).

28. *See, e.g., New York ex rel. Cohn v. Graves*, 300 U.S. 308, 315 (1937) (upholding state tax on domiciliary's income earned from property located out of the state).

29. *See, e.g., Williams v. North Carolina*, 317 U.S. 287, 298-99 (1942) (state can alter the marital status of its domiciliaries even if the other spouse is absent).

30. "*Lex loci contractus*" means "the law of the place where the contract was made." 2 J.H. BEALE, *THE CONFLICT OF LAWS* 1044 (1935). Generally, the rule meant that "contracts . . . are . . . expounded and executed . . . according to the laws of the place in which they were made." *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 589 (1839) (Taney, C.J.).

31. H. GOODRICH, *HANDBOOK ON THE CONFLICT OF LAWS* 8-10 (1927). Under this view, "rights once vested under the law continue until they are destroyed or cut off by law." *Id.* at 10. Such rights are "recognized and enforced in one state though they have come into being in another, unless such enforcement is, for good reason, thought contrary to the public policy of the jurisdiction where enforcement is sought." *Id.* *See also* Beale, *What Law Governs the Validity of a Contract*, 23 HARV. L. REV. 260, 270-72 (1910); R. LEFLAR, *AMERICAN CONFLICTS LAW* 173 (3d ed. 1977).

32. For example, in *Western Union Tele. Co. v. Brown*, 234 U.S. 542 (1914), a telegram was to be sent from South Carolina to the District of Columbia. A delay in its delivery caused mental anguish. Damages for anguish were recoverable in South Carolina, but not in the District of Columbia. Suit was brought in South Carolina. Justice Holmes, writing for the Court, held that the state could not allow recovery. "[W]hen a state attempts . . . to affect

the interests involved.³³ A state had the power to adjudicate a claim over land within its borders even without jurisdiction over the person.³⁴ Indeed, this power was so well established that the Supreme Court denied recognition of a judgment procured away from the situs of the land.³⁵

Reliance on domicile as a basis for imposing duties also illustrates this power-based approach. In *Cole v. Cunningham*,³⁶ a state was allowed to enjoin a domiciliary from pursuing actions outside the state. Similarly, the state of a person's domicile could tax her on chattels owned elsewhere.³⁷ In some instances, this power to tax was to the exclusion of attempts to tax elsewhere.³⁸ As with jurisdiction based on the

conduct outside its jurisdiction or the consequences of such conduct, and to infringe upon the power of the United States [within the District of Columbia], it must fail." *Id.* at 547.

Any special status of the United States was probably not critical in reaching such a result. Earlier, the Court spoke in territorial terms in defining "the natural limits of [jurisdictional] power" and referred to land outside the territory as "within the jurisdiction of a distinct power." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 442 (1821) (Marshall, C.J.). In *Cohens*, Virginia sought to prosecute for the sale in Virginia of lottery tickets issued by the District of Columbia, in the face of a federal statute authorizing the city to raise money through a lottery. *Id.* The Court interpreted the statute as not prohibiting states from penalizing the sale of lottery tickets. *Id.* at 447; see also RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 146-47 (1971). In *Nevada v. Hall*, 440 U.S. 410 (1979), the plaintiff had recovered a judgment against the State of Nevada in the California courts based on the conduct of a Nevada employee inside California. The Court held that this judgment was entitled to full faith and credit, although Nevada law would have limited recovery to \$25,000.

33. An example of this principle in an area that remains controlled by federal principles of conflict of laws is admiralty. Until quite recently, the Supreme Court has consistently followed Justice Story's opinion as a Circuit Justice that "[t]he admiralty jurisdiction in tort was traditionally 'bounded by locality,' encompassing all torts that took place on navigable waters." *Nacirema Operating Co. v. Johnson*, 396 U.S. 212, 215 n.7 (1969) (citations omitted) (quoting *De Lovio v. Boit*, 7 F. Cas. 418, 444 (C.C.D. Mass. 1815) (No. 3776) (Story, J.)). As the Court noted, Justice Story's opinion as Circuit Judge had been followed in *Insurance Co. v. Dunham*, 78 U.S. (11 Wall.) 1 (1871). The Supreme Court has rejected a locality test as a sole predicate for determining what torts are within the admiralty jurisdiction. The Court held that the landing of a plane in navigable water did not make the resulting lawsuits subject to admiralty jurisdiction, regardless of whether the accident was caused by negligence over the water or on the ground. *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972); see also *Foremost Ins. Co. v. Richardson*, 457 U.S. 668 (1982).

34. See *Pennoyer v. Neff*, 95 U.S. 714, 723 (1877), overruled by *Shaffer v. Heitner*, 433 U.S. 186 (1977); *Tyler v. Judges of the Court of Registration*, 175 Mass. 71, 55 N.E. 812 (Holmes, C.J.), appeal dismissed, 179 U.S. 405 (1900) (giving Massachusetts jurisdiction to clear title based on the presence of land in the state).

35. *Fall v. Eastin*, 215 U.S. 1, 8-9 (1909).

36. 133 U.S. 107, 114 (1890).

37. *Savings & Loan Soc'y v. Multnomah County*, 169 U.S. 421, 427 (1898).

38. *Hays v. Pacific Mail S.S. Co.*, 58 U.S. (17 How.) 596 (1855). More recently, the Supreme Court has written:

The "home port doctrine" enunciated in *Hays* was a corollary of the medieval maxim *mobilia sequuntur personam* ("movables follow the person") and resulted in personal property being taxable in full at the domicile of the owner. This theory of taxation, of course, has fallen into desuetude, and the "home port doctrine," as a rule for

presence of land, jurisdiction based on domicile could be so compelling that it allowed states to deny recognition of judgments not based on domicile. *Haddock v. Haddock*³⁹ held that the state of the marital domicile could preserve a marriage although another state had granted a divorce to one spouse without acquiring jurisdiction over the other spouse residing in the state of the marital domicile. *Andrews v. Andrews*⁴⁰ held that a state had no power to grant a divorce even though both spouses were present in the court.⁴¹

Of course, these two theories were not consistent. While Justice Story wrote that no State could “*directly affect*” persons and property outside the state, his text implicitly recognized that indirect effects were the necessary result of jurisdiction to prescribe exercised against absent domiciliaries.⁴² Corporations were no freer than natural persons from the consequences of this conflict.

B. Applying the Power Analysis to Corporate Affairs

The Court’s power analysis creates a conflict between competing powers. Claims of jurisdiction to prescribe may be based on both domicile and contract on the one hand (*i.e.*, the internal affairs doctrine) and, on the other hand, the presence of people and things to which the corporation has ties—the corporation’s external relations. This dichotomy makes resolution of the potential conflicts resulting from the attempted extraterritorial regulation of hostile takeovers under the traditional power analysis impossible. First, we briefly discuss the law establishing jurisdiction to prescribe as to corporations founded on these two bases of jurisdiction. Second, we address the inadequacies of the power analysis as applied to attempts to exercise jurisdiction to prescribe corporate conduct.

taxation of moving equipment, has yielded to a rule of fair apportionment among the States. This Court, accordingly, has held that various instrumentalities of commerce may be taxed, on a properly apportioned basis, by the nondomiciliary States through which they travel.

Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 442 (1979) (citations omitted); *see also infra* notes 168-75 and accompanying text.

39. 201 U.S. 562 (1906), *overruled by* Williams v. North Carolina, 317 U.S. 287 (1942).

40. 188 U.S. 14 (1903).

41. A Massachusetts statute relevant in *Andrews* prohibited inhabitants from getting a divorce elsewhere based on conduct that occurred in Massachusetts, or based on conduct that would not have authorized a divorce under Massachusetts laws. *Id.* at 29.

42. J. STORY, *supra* note 20.

1. *The Internal Affairs Doctrine*

The traditional theory of jurisdiction over intra-corporate relations allows only the state of incorporation to regulate the internal affairs of the corporation. Two factors explain the internal affairs doctrine. First, a corporation is created by the state.

[A] corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law; and where that law ceases to operate, and is no longer obligatory, the co[r]poration can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty.⁴³

Because the state of incorporation gives the corporation its existence, it is subject to the power of that state.⁴⁴ Thus, under this power theory, the state of incorporation has the sole power to regulate its corporations.⁴⁵ This reasoning was repeated recently in *CTS Corp. v. Dynamics Corp. of America*.⁴⁶

Second, a corporation is a contract.⁴⁷ Because the law of the place of contracting governs, other states could not apply laws that interfered with the contract.⁴⁸ This comity-based conclusion is reinforced by the Contract Clause.⁴⁹ Because other states could not alter a contract's terms, they could not interfere with a corporation's internal affairs.⁵⁰

These principles led the courts to require the application of the laws of the state of organization. Some of the most remarkable cases involved benevolent organizations. These fraternal societies served as mutual insurance companies. As insurance companies, their contracts normally would have been easily within the scope of regulation of the state in which the insured was domiciled.⁵¹ However, because these were mutual

43. *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 588 (1839).

44. *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819), quoted in *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 89 (1987).

45. Cf. *Head v. Providence Ins. Co.*, 6 U.S. (2 Cranch) 127, 167 (1804) (Marshall, C.J.) ("To this source of its being, then, we must recur to ascertain its powers . . .").

46. 481 U.S. 69, 91 (1987) ("It thus is an accepted part of the business landscape in this country for States to create corporations, to prescribe their powers, and to define the rights that are acquired by purchasing their shares.").

47. *Trustees of Dartmouth College*, 17 U.S. (4 Wheat.) at 643-44.

48. See *Order of Commercial Travelers of Am. v. Wolfe*, 331 U.S. 586 (1947); *Harrison v. Sterry*, 9 U.S. (5 Cranch) 289, 298-99 (1809).

49. U.S. CONST. art. I, § 10, cl. 1.

50. 17 U.S. (4 Wheat.) at 643-44.

51. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 192 (1971). However, the *Restatement* suggests that group insurance policies could be "governed by [the] law which governs the master policy. This is because it is desirable that each individual insured should enjoy the same privileges and protection." *Id.* at comment h.

societies, which incorporated their contracts with members into by-laws, they were relatively immune from state regulation.

The Supreme Court has held comparatively recently that the forum state could not use its own statute of limitations to allow a suit barred by the limitations period established in the articles of incorporation of a fraternal benefit organization.⁵² The case is a remarkably strong instance of the displacement of forum law because, as the case recognized, statutes of limitation are ordinarily considered procedural, and so can be governed by forum law even though the forum has no connection with the claim sued upon.⁵³

In an earlier case, the Court was faced with a by-law, adopted after the member in question joined, which provided that death benefits could not be paid until the life expectancy of the supposed decedent expired.⁵⁴ Under the law of the forum, long absence implied death. The by-law to the contrary was held to govern. Justice Holmes wrote for a unanimous Court:

The indivisible unity between the members of a corporation of this kind in respect of the fund from which their rights are to be enforced and the consequence that their rights must be determined by a single law, is elaborated in *Supreme Council of the Royal Arcanum v. Green*.⁵⁵ The act of becoming a member is something more than a contract, it is entering into a complex and abiding relation, and as marriage looks to domicile, membership looks to and must be governed by the law of the State granting the incorporation.⁵⁶

In *Royal Arcanum*, the Court emphasized the need to use Massachusetts law, notwithstanding the New York residence of the shareholder, because the Massachusetts charter of the corporation meant that the parties consented to Massachusetts law and because of the need to avoid confusing and inconsistent standards of liability.⁵⁷

The authority of the state of incorporation extended even to matters

52. *Wolfe*, 331 U.S. 586.

53. *Id.* at 607. See also *Sun Oil Co. v. Wortman*, 486 U.S. 717, 724-27 (1988) (no constitutional objection to a state's applying its own statute of limitations to a suit with no other connection to the forum). In *Clay v. Sun Ins. Office, Ltd.*, 377 U.S. 179, 183 (1964), the Court allowed a state other than the one in which the contract was written to override a provision requiring suit to be brought within one year. The Court described *Wolfe* as "a highly specialized decision dealing with unique facts," and referred to the indivisible unity involved in fraternal benefit corporations. *Id.*

54. *Modern Woodmen of Am. v. Mixer*, 267 U.S. 544 (1925) (Holmes, J.).

55. 237 U.S. 531, 542 (1915).

56. 267 U.S. at 551 (citation moved to footnote).

57. 237 U.S. at 542-43.

of other states' procedure. In *Broderick v. Rosner*,⁵⁸ Justice Brandeis, writing for the Court, dealt with a New York law making shareholders of banking corporations liable for the par value of their shares in addition to the amount invested.⁵⁹ Broderick, the New York Superintendent of Banks, sued shareholders domiciled in New Jersey in New Jersey state court. New Jersey law barred such an action unless all shareholders and creditors were involved.⁶⁰ As a practical matter, this meant that no action could be brought against the New Jersey domiciliaries because one could not obtain jurisdiction in a New Jersey action over those who were neither resident nor doing business in New Jersey.⁶¹ Even if one could bring an action, the requirement of joinder would make the cost of the action prohibitively expensive.⁶²

The Court held that New Jersey could not apply this regulation in its own courts.⁶³

The statutory liability sought to be enforced is contractual in character. The assessment is an incident of the incorporation. Thus the subject matter is peculiarly within the regulatory power of New York, as the State of incorporation. "So much so," as was said in *Converse v. Hamilton*,⁶⁴ "that no other State properly can be said to have any public policy thereon."⁶⁵

The Court relied on cases involving fraternal benefit corporations, and on past cases equating them with ordinary corporations.⁶⁶

These cases demonstrate that the internal affairs doctrine goes beyond the ordinary rule that prohibited courts from applying one state's law to contracts formed in another state. For example, under *New York Life Insurance Co. v. Head*,⁶⁷ a state that was merely the place the contract was made could not prohibit the parties from altering that contract outside the state. In *Bradford Electric Light Co. v. Clapper*,⁶⁸ Justice Brandeis, writing for the Court, suggested that New Hampshire could

58. 294 U.S. 629 (1935).

59. *Id.* at 637.

60. *Id.* at 638.

61. *Id.* at 639.

62. *Id.* at 640.

63. This result is like that in *Testa v. Katt*, 330 U.S. 386 (1947), except that the foreign law that a state must enforce is that of another state, not the federal government, so that the textual basis for the enforcement is the Full Faith and Credit Clause, not the Supremacy Clause.

64. 224 U.S. 243, 260 (1912) (italics added).

65. 294 U.S. at 643 (citation moved to footnote).

66. *Id.* at 643-44 (quoting *Modern Woodmen of Am. v. Mixer*, 267 U.S. 544, 551 (1925) (Holmes, J.), suggesting no substantial difference between the benevolent corporation and regular corporation cases).

67. 234 U.S. 149 (1914).

68. 286 U.S. 145 (1932).

modify Vermont worker's compensation law as applied to conduct occurring in New Hampshire. "It [the statute] does not attempt to forbid or regulate subsequent modification of the Vermont contract" ⁶⁹

The Court's interpretation of the Privileges and Immunities Clause⁷⁰ to exclude corporations from its protection might have allowed the states greater power to regulate corporations.⁷¹ However, the states' power to exclude corporations entirely did not allow the states to condition the admission of corporations on their accepting conditions "inconsistent with those rules of public law which secure the jurisdiction and authority of each State from encroachment by all others."⁷² Subsequent cases expressly held that a state could not condition the admission of foreign corporations on the application of the state's laws to a transaction more properly within the sphere of other states.⁷³ Consequently, no countervailing constitutional doctrine modified the impetus the Commerce and Contracts Clauses provided toward eliminating any claim by states other than the state of incorporation to regulate the internal affairs of a corporation.

2. *The External Relations of the Corporation*

The second legal theory underlying state laws asserting a right to regulate corporate transactions is that jurisdiction to prescribe can be based on the presence of the people or things with which the corporation

69. *Id.* at 157 n.7.

70. U.S. CONST. art. IV, § 2, cl. 1.

71. *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 177-78 (1869). The Court stated that the states "may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest." *Id.* at 181; *see also* *Anglo-American Provision Co. v. Davis Provision Co.*, 191 U.S. 373 (1903) (a state could bar a suit by a foreign corporation on a foreign judgment even though domestic corporations could sue on foreign judgments).

72. *Insurance Co. v. Morse*, 87 U.S. (20 Wall.) 445, 456 (1874) (quoting *Lafayette Ins. Co. v. French*, 59 U.S. (18 How.) 404, 407 (1855) (citation omitted)). In *Morse*, an out-of-state insurance company's right to do business in the state had been conditioned on an agreement not to remove cases to federal court. The Supreme Court allowed removal, notwithstanding the agreement. The *Morse* Court continued, "None of the cases so much as intimate that conditions may be imposed which are repugnant to the Constitution and laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each State from encroachment by others." *Id.* at 457. The Court rejected the dissent's appeal to the authority of *Paul* by describing the statements of that Court as dicta. *Id.* at 455-56.

73. *New York Life Ins. Co. v. Head*, 234 U.S. 149, 163-64 (1914); *accord* *Louis K. Liggett Co. v. Baldridge*, 278 U.S. 105, 111 (1928). An additional limit on the states' power over foreign corporations was that the Equal Protection Clause prohibited states from imposing an unequal tax on foreign corporations qualified to do business. *Southern Ry. v. Greene*, 216 U.S. 400, 418 (1910).

has ties—its external relations. Like the states' ability to adjudicate claims concerning land within their borders,⁷⁴ these efforts result from a territorial basis for jurisdiction to prescribe.

These were exceptions to the general rule that the applicable law is that of the state of incorporation. In general, the laws of agency of the state where third parties were dealing with the agent governed the principal's liability for its agents' conduct with those third parties, whether the principal was a corporation or a natural person.⁷⁵ Furthermore, a state could give a foreign corporation good title to land located in the state, although the law of the state of incorporation prohibited the corporation from owning land.⁷⁶ Transfers from the corporation that violated the creditors' interests were likely to be assessed on the basis of the law where the tangible assets existed.⁷⁷ And, while some authorities suggested that the obligations of majority shareholders, directors, and officers to the corporation and to minority shareholders were to be determined generally by the law of the state of incorporation,⁷⁸ numerous cases reached the opposite result.⁷⁹ The latter cases often represent the common situation when a Delaware incorporation is chosen for convenience, but no other corporate contacts exist with Delaware.

The traditional modes of regulation based on the presence of the corporation's external relations were so obvious that they seldom led to discussion. For example, state courts routinely applied domestic law to issues involving fraudulent conveyances, bulk transfers, secured transactions, and disregard of the corporate form even though foreign corporations are involved. These issues do not affect the rights of the corporation and shareholders *inter se*.⁸⁰ Because such cases concerned the rights of those not a party to the contract of incorporation, the rule that contracts were to be governed by the law of the state of contracting, which was one reason for deferring to the law of the state of incorporation, did not apply.

74. See *supra* note 34 and accompanying text.

75. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 292 comment d, illustration 2 (1971); *id.* § 301.

76. *Id.* § 301 comment c, illustration 1.

77. See U.C.C. § 6-102 (1988).

78. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 306, 309 (1971).

79. *E.g.*, Schwarz v. Artcraft Silk Hosiery Mills, Inc., 110 F.2d 465 (2d Cir. 1940) (law of state in which foreign corporation was doing business was applied); Ficor, Inc. v. McHugh, 639 P.2d 385, 391 (Colo. 1982) (refusal to apply law of the state of incorporation when corporation had more significant contacts with forum).

80. See generally Reese & Kaufman, *The Law Governing Corporate Affairs: Choice of Law and the Impact of Full Faith and Credit*, 58 COLUM. L. REV. 1118, 1120-23 (1958).

In the area of bulk sales, for example, the original version of the Uniform Commercial Code, and Article 6, its recently proposed revision, illustrate the alternatives. The original version made the bulk sales laws applicable to goods within the state.⁸¹ The proposed amendments, as of this writing, have been adopted by committee, but have not been approved by the American Law Institute. The amendments confer jurisdiction on the basis of the corporation's principal place of business.⁸² The case law interpreting the bulk sales act recognizes the need to protect creditors, but not contracting parties. The cases conclude that failure to satisfy the act may not invalidate the contract as between the contracting parties, even though it may invalidate the transfer as to creditors.⁸³

Secured transactions law, albeit not known by this term until recently, has never been subject to the law of the state of incorporation. An early opinion written by Chief Justice Marshall illustrates the distinction drawn between contract issues and issues of priority.

The law of the place where a contract is made is, generally speaking, the law of the contract; it is the law by which the contract is expounded. But the right of priority forms no part of the contract itself. It is extrinsic, and is rather a personal privilege dependent on the law of the place where the property lies, and where the court sits which is to decide the cause.⁸⁴

Similarly, the courts disregarded the law of the corporate domicile in determining whether the corporate form should be disregarded.⁸⁵ The

81. U.C.C. § 6-102(4) (1972).

82. U.C.C. § 6-103(1)(b) (proposed draft 1988). When a company might be thought to have more than one place of business, the place of its chief executive office is considered its principal place of business. *Id.*

83. *E.g.*, *Macy v. Oswald*, 198 Pa. Super. 435, 439, 182 A.2d 94, 96 (1962); *Herrick v. Robinson*, 267 Ark. 576, 588, 595 S.W.2d 637, 645 (1980).

84. *Harrison v. Sterry*, 9 U.S. (5 Cranch) 289, 298-99 (1809); *accord* *Hervey v. Rhode Island Locomotive Works*, 93 U.S. 664, 668 (1876) (law of situs of property governs fraudulent conveyances); *Knowles Loom Works v. Vacher*, 57 N.J.L. 490, 392-94, 31 A. 306, 307 (1895) (priority in property of corporate debtor). *See generally* 37 AM. JUR. 2D *Fraudulent Conveyances* § 110 (1968); 37 C.J.S. *Fraudulent Conveyances* § 3 (1943).

85. *E.g.*, *Helzer v. F. Joseph Lamb Co.*, 171 Mich. App. 6, 9-10, 429 N.W.2d 835, 836-37 (1988); *Estudios, Proyectose e Inversiones de Centro Am., S.A. v. Swiss Bank Corp. (Overseas) S.A.*, 507 So. 2d 1119, 1120-21 (Fla. Dist. Ct. App. 1987), *review denied*, 518 So. 2d 1274 (Fla. 1987); *Rice v. Oriental Fireworks Co.*, 75 Or. App. 627, 632-33, 707 P.2d 1250, 1255 (1985), *review denied*, 300 Or. 546, 715 P.2d 93 (1986); *Estate of Rothko*, 84 Misc. 2d 830, 859, 379 N.Y.S.2d 923, 953-54 (Surrogate Court 1975), *modified on other grounds sub nom.* *Will of Rothko*, 56 A.D.2d 499, 392 N.Y.S.2d 870, *aff'd sub nom.* *In re Estate of Rothko*, 43 N.Y.2d 305, 401 N.Y.S.2d 449, 372 N.E.2d 291 (1977). *Helzer* applied Michigan law in a suit brought by Michigan residents injured in Canada in determining not to disregard the separate existence of a Canadian corporation. The individual defendant in *Estudios* created "an intriguing and complicated network of foreign corporations, which he secretly controls, for the express purpose of hiding his and his family's personal assets from their creditors." 507 So. 2d at 1121.

most famous of such cases is *First National City Bank v. Banco Para el Comercio Exterior de Cuba*,⁸⁶ in which the Supreme Court examined whether two entities could be treated as one for purposes of offsetting a claim against one against a debt owed to the other. The Court recognized the general rule that the law of the jurisdiction of incorporation governed.⁸⁷ The Court found this rule inapplicable, however, when the rights of third parties were involved⁸⁸ or when the use of the corporate form would defeat legislative policies.⁸⁹ It ultimately applied American federal common law and international law to pierce the veil of entities owned by foreign governments.⁹⁰

Building upon these regulations based on the location of the corporation's external relations, states have recently attempted to use the presence of the external relations of the corporation to regulate internal affairs of foreign corporations, especially in the area of anti-takeover legislation.⁹¹ California presents a well known example of a state legislative effort to regulate the internal affairs of foreign corporations. California applies various corporate governance provisions to those foreign corporations with substantial ties to the state.⁹² Section 2115 extends various corporate governance provisions to foreign corporations subject to the statute's terms. These provisions include California's cumulative voting

The court pierced the veil. The *Oriental Fireworks* court pierced the veil in connection with personal jurisdiction. The court noted third parties' interests in the rules requiring observance of the corporate form. None of the other cases expressed this concern, and none expressly considered the possibility that foreign law might govern. *Rothko* applied veil-piercing rules without clear distinction between domestic and foreign corporations.

86. 462 U.S. 611 (1983).

87. *Id.* at 621 ("[T]he law of the state of incorporation normally determines issues relating to the internal affairs of a corporation. Application of that body of law achieves the need for certainty and predictability . . ." (emphasis in original)).

88. *Id.* ("Different conflicts principles apply, however, where the rights of third parties external to the corporation are at issue." (emphasis in original)).

89. *Id.* at 630 ("[T]he Court has consistently refused to give effect to the corporate form where it is interposed to defeat legislative policies.").

90. *Id.* at 623.

91. In 1968, only one state had an anti-takeover statute; by 1982, thirty-seven states had such statutes. *Edgar v. MITE Corp.*, 457 U.S. 624, 631 n.6 (1982) (plurality opinion). In *Edgar*, the Court invalidated an Illinois statute regulating takeovers of foreign corporations. The application of the statute could be based on, *inter alia*, ownership by Illinois shareholders of 10% of any class of equity securities of the corporation subject to the offer, or on two of three of the following conditions: a principal executive office in Illinois, organized under the laws of Illinois, or at least 10% of its stated capital and paid-in surplus represented within the state. *Id.* "Typically, any of a number of jurisdictional links might trigger the application of such an anti-takeover statute: the target's being incorporated in the state, its having a principal office or major operations in the state, or the existence of a significant number of target shareholders in the state." R. CLARK, *supra* note 3, at 569.

92. CAL. CORP. CODE § 2115 (West Supp. 1990).

requirement, its standard of care for directors, and its indemnification provision. The statute's applicability depends upon the property, payroll, and sales factors considered under the state internal revenue code, and the percentage of the shareholders of record having California addresses.⁹³

In *Wilson v. Louisiana-Pacific Resources, Inc.*,⁹⁴ a California Court of Appeal upheld the application of California's section 2115 cumulative voting requirement to a Utah corporation.⁹⁵ In rejecting a claim that the California law denied Utah's statute Full Faith and Credit, the court considered the relative interests of Utah and California. It concluded that Utah's interest in a laissez faire policy on cumulative voting "would seem to be clearly outweighed by the interests of California, in which a majority of shareholders and the corporation's business activity is located."⁹⁶

Washington state recently adopted an anti-takeover statute that attempts to govern foreign corporations.⁹⁷ The Washington act is a moratorium statute, which temporarily restricts an acquiring shareholder's ability to mortgage or break up the acquired company for short-term gain or to finance the acquisition debt. The Washington act applies to domestic corporations with principal executive offices in Washington if either (1) a majority of their employees, including those of their subsidiaries, are Washington residents, or (2) these corporations and their subsidiaries employ more than one thousand state residents.⁹⁸ The act also applies to foreign corporations that have their principal executive offices in Washington if: (1) more than ten percent of their shareholders of record are Washington residents, more than ten percent of their shares are owned by Washington residents, or one thousand or more of their share-

93. CAL. CORP. CODE § 2115(a) (West Supp. 1990).

94. 138 Cal. App. 3d 216, 187 Cal. Rptr. 852 (1983).

95. Utah corporations law provided for straight voting, but permitted the use of cumulative voting when the articles of incorporation so provided. *Id.* at 221, 187 Cal. Rptr. at 856. In cumulative voting,

each shareholder may multiply the number of votes he is entitled to cast (based on the number of shares held by him) by the number of directors to be elected by the voting group at the meeting and may cast the product for a single candidate or distribute the product among two or more candidates. By casting all his votes for a single candidate or a limited number of candidates, a minority shareholder increases his voting power and may be able to elect one or more directors.

REVISED MODEL BUSINESS CORP. ACT § 7.28 official comment 2 (1984).

96. 138 Cal. App. 3d at 223, 187 Cal. Rptr. at 857. *See also* *Western Air Lines, Inc. v. Sobieski*, 191 Cal. App. 2d 399, 12 Cal. Rptr. 719 (1961) (concluding that the California Commissioner of Corporations had jurisdiction to require cumulative voting by a Delaware corporation which had its principal place of business in California).

97. Callahan & Burman, *supra* note 10.

98. WASH. REV. CODE § 23B.19.020(13)(a) (1989).

holders of record reside in Washington; (2) a majority of their employees are Washington residents or they employ more than one thousand Washington residents; and (3) a majority of their tangible assets are located in Washington or they have more than fifty million dollars worth of tangible assets located in Washington.⁹⁹

While the potential for conflicting exercises of jurisdiction were always present in the case of corporations, it remained in the background because states in which the corporation's assets or agents acted generally refrained from attacking corporate governance. These statutes, by virtue of their ubiquity and by attempting to regulate transactions involving a high degree of planning, make some mechanism for resolving the conflict imperative.

C. The Inadequacy of the Power Analysis to Determine Jurisdiction to Prescribe for a Corporation

1. *Multiple Sources of Power Make the Power Analysis Ambiguous When Applied to Corporate Affairs*

When corporations operate in more than one state, multiple sources of jurisdictional power exist. Citizenship (in this case, the state of incorporation) and the presence of persons and property (the corporate assets and employees) all give rise to credible assertions of jurisdiction to prescribe based on a power theory.¹⁰⁰ The Supreme Court has not resolved these competing claims, and its past cases suggest no principled resolution to the conflict between citizenship and the presence of persons and property.

In *Kidd v. Alabama*, the Court allowed the double taxation of intangibles by two different states because neither state's theory of the location of the assets could be shown to be repugnant to the Full Faith and Credit Clause.¹⁰¹ In *Blackstone v. Miller*,¹⁰² the Court addressed the assertion of competing power-based claims and allowed both the domicile of the decedent and the situs of property in the decedent's estate to tax the property.

99. *Id.* § 23B.19.020(13)(b) (1989).

100. While this conflict potentially exists when a natural person acts or owns property outside her domicile, the conflict is more acute for corporations, which may choose a state of incorporation for the purpose of avoiding requirements imposed by its principal place of business.

101. 188 U.S. 730, 732 (1903) (Holmes, J.). The case involved a tax on stock. *Id.* at 731. Alabama taxed on the basis of the location of the owner of the stock; other states taxed on the location of the tangible property that made the stock valuable. *Id.* at 732.

102. 188 U.S. 189 (1903) (Holmes, J.).

[N]o one doubts that succession to a tangible chattel may be taxed wherever the property is found, and none the less that the law of the *situs* accepts its rules of succession from the law of the domicile, or that by the law of the domicile the chattel is part of a *universitas* and is taken into account again in the succession tax there.¹⁰³

Indeed, the Court even rejected an attempt to police an internal inconsistency in New York's law, which sought to tax both on the basis of the decedent's domicile and the situs of property.¹⁰⁴ By allowing the exercise of jurisdiction by both the state of organization and the state where the assets of the organization were located, the Supreme Court's opinions suggested that it would refuse to resolve the conflicting duties placed on corporations by different states' laws.

Moreover, even when the Supreme Court's cases suggested a solution in principle, it could often be difficult to discern that solution in advance. The Supreme Court held that an equity court could adjudicate rights in land, albeit not ultimately conveying title, if it had jurisdiction over the person.¹⁰⁵ To convey title, however, the court must compel the person conveying title to observe the proper forms. In *Fall v. Eastin*,¹⁰⁶ the Court held that a conveyance executed by a commissioner appointed to do the task was not entitled to extraterritorial effect.¹⁰⁷ Thus, the trial court's attempt to assert jurisdiction to prescribe failed because the trial court did not realize that giving extraterritorial effect to the decree necessitated imprisoning the defendant until he signed, rather than simply appointing a commissioner to do the signing. In *Selover, Bates & Co. v. Walsh*,¹⁰⁸ a contract for sale of land in Colorado was signed in South Dakota by the buyer, then signed in Minnesota by the seller. Payments

103. *Id.* at 204.

104. It may be regretted, also, that one and the same State should be seen taxing on the one hand according to the fact of power, and on the other, at the same time, according to the fiction that, in successions after death, *mobilia sequuntur personam* and domicile governs the whole. But these inconsistencies infringe no rule of constitutional law.

Id. at 205.

105. *Massie v. Watts*, 10 U.S. (6 Cranch) 148, 158 (1810) (Marshall, C.J.), held that "the principles of equity give a court jurisdiction wherever the person may be found." This jurisdiction, however, is limited to cases of fraud, of trust, or of contract. *Id.* at 160. *Pennoyer v. Neff* limits this jurisdiction over people to those domiciled in the jurisdiction. *Pennoyer v. Neff*, 95 U.S. 714, 723 (1877).

106. 215 U.S. 1 (1909).

107. "The deed executed by the commissioner in this case must be considered as forming part of the proceedings in the court of chancery, and no greater effect can be given to it than if the decree itself, by statute, was made to operate as a conveyance in Kentucky as it does in Ohio."

Id. at 8-9 (quoting *Watts v. Waddle*, 31 U.S. (6 Pet.) 389, 400-01 (1832) (minor alterations by *Fall Court*)).

108. 226 U.S. 112 (1912).

were to be made in the seller's office in Minnesota. The seller tried to forfeit the land and sold it to another. The buyer sued in the Minnesota courts and won, based on a Minnesota statute requiring notice and a chance to cure before the forfeiture of a buyer's interest in real estate. The Court classified the right involved as personal and contractual because the buyer did not seek reconveyance of the land.¹⁰⁹ Therefore, the law of the state of contracting was permitted to govern. The Court's opinion suggested that the law of the situs would govern if the buyer had sought reconveyance.¹¹⁰ Both *Fall* and *Walsh* were decided by divided Courts, suggesting the uncertainty surrounding the application of traditional doctrine.

2. *This Ambiguity Was Compounded by the Application of Different Rules for Determining the Situs*

The ambiguity of the power theory was aggravated by the Supreme Court's failure to impose consistent rules for determining the situs of properties and consistent applications of these rules. For example, Delaware's characterization of the situs of stock as the state of incorporation¹¹¹ would give it jurisdictional power even though another state asserted jurisdiction based on the presence of physical stock certificates or the location of the actions giving rise to the litigation.¹¹² In another case, the Court noted four different rules for taxing negotiable instruments.¹¹³

Different characterizations of the situs could lead to conflicting results even when two states both based jurisdiction on domicile or the presence of property. The problem was especially great when intangibles were involved because of the impossibility of physically locating them within a jurisdiction for a court to apply the power theory.

In a number of cases, the Court permitted dual taxation of estates because of conflicting determinations of domicile,¹¹⁴ even though domicile has been held in other contexts to be a jurisdictional fact capable of being relitigated.¹¹⁵

109. *Id.* at 123.

110. *Id.* at 124.

111. *See Shaffer v. Heitner*, 433 U.S. 186 (1977).

112. Delaware's rule was apparently unique. *See id.* at 218 (Stevens, J., concurring).

113. *Farmers Loan & Trust Co. v. Minnesota*, 280 U.S. 204, 208 (1930).

114. *Worcester County Trust Co. v. Riley*, 302 U.S. 292, 297 (1937); *Cory v. White*, 457 U.S. 85, 89 (1982) ("inconsistent determinations by the courts of two States as to the domicile of a taxpayer d[o] not raise a substantial federal constitutional question").

115. *Williams v. North Carolina*, 325 U.S. 226 (1945).

3. *The Power Analysis Is Tautological*

Within the context of a multi-state federal system, a power analysis is ultimately tautological. What states can decide depends on what the Supreme Court lets them decide. Just as the Supreme Court in *Pennoyer v. Neff*¹¹⁶ prohibited the states from exercising power unless they provided notice and opportunity to be heard, it could have prohibited their exercising power unless they satisfied the requirements of a reasonable connection with the forum that were later enunciated in *Hanson v. Denckla*.¹¹⁷ So, too, could the Supreme Court reject assertions of jurisdiction to prescribe unless they satisfy considerations of fairness and convenience.

4. *The Inability of the Power Theory to Resolve the Dilemma Creates a Constitutional Difficulty*

The inability to predict what law will govern creates a constitutional problem.¹¹⁸ In the context of Full Faith and Credit and Due Process, that problem has generally meant the application of a rule of law that the parties could not have predicted would apply.¹¹⁹ The due process dilemma, however, also exists in situations in which it is impossible to predict which of two laws will apply. This has arisen most clearly in areas of vertical conflicts of law, between federal and state law in a federal system. The famous decision of *Erie Railroad v. Tompkins*¹²⁰ was in Justice Brandeis' view a constitutional decision based on the need to avoid the uncertainty resulting from the impossibility of determining whether state or federal law would apply to a transaction.¹²¹ As Justice Harlan wrote, "*Erie* recognized that there should not be two conflicting systems of law controlling the primary activity of citizens, for such alternative governing authority must necessarily give rise to a debilitating uncer-

116. 95 U.S. 714, 732 (1877).

117. 357 U.S. 235 (1958).

118. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

119. *See, e.g., Home Ins. Co. v. Dick*, 281 U.S. 397 (1930) (Texas law applied to a dispute involving a fire insurance policy issued and to be performed in Mexico, for a Texan residing in Mexico; policy was covered in part by reinsurance effected in Mexico or New York by New York companies licensed to do business in Texas).

120. 304 U.S. 64 (1938).

121. Persistence of state courts in their own opinions on questions of common law prevented uniformity; and the impossibility of discovering a satisfactory line of demarcation between the province of general law and that of local law developed a new well of uncertainties. . . . [T]he doctrine rendered impossible equal protection of the law.

Id. at 74-75 (footnotes omitted). *Cf. id.* at 74 n.8 ("Probably no decision of the Court has ever given rise to more uncertainty as to legal rights" (quoting 2 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 89 (rev. ed. 1935))).

tainty in the planning of everyday affairs.”¹²²

The uncertainty in corporate law is greater than the uncertainty created by the inability to determine whether state or federal law would apply before *Erie*. In such conflicts, the court deciding the case would be able conclusively to determine what law to apply. By contrast, any state needing to regulate a shareholder's rights in a corporation may well lack the jurisdiction over the shareholder necessary to resolve conclusively the governing law. This is because personal jurisdiction cannot be based on the mere ownership of stock in a corporation subject to personal jurisdiction.¹²³ Consequently, even a final judgment by the state of incorporation or by the state of the principal place of business may not remove the uncertainty over what law governs.

II. The Proposed Solution: The Universality Requirement

A. Proposed Rule: A State Can Claim Jurisdiction to Prescribe Only on the Basis of Circumstances That Would Lead It to Recognize Another State's Assertion of Jurisdiction

Under the rule we propose, a state may assert jurisdiction only on the basis of circumstances that would lead it to recognize another state's jurisdiction. For example, if a state regulates a corporation because it is incorporated in the state, it must allow another state to regulate corporations incorporated in that state. Conversely, if a state regulates a corporation because it has its principal place of business within the state, it must recognize another state's regulation of a corporation with its principal place of business in that state. Under this rule, a state must adopt one set of principles for determining both when it will exercise jurisdiction to prescribe and when it will recognize jurisdiction to prescribe. It cannot exercise jurisdiction to prescribe on the basis of facts that would not cause it to recognize another state's jurisdiction to prescribe.

The essential characteristic of the rule is that a state can assert jurisdiction only on the basis of criteria which could be used at the same time

122. *Hanna v. Plumer*, 380 U.S. 460, 474 (1965) (Harlan, J., concurring) (footnote omitted).

123. *E.g.*, *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333, 336-37 (1925); *Consolidated Textile Corp. v. Gregory*, 289 U.S. 85, 88 (1933). *See also* *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 705 n.* (1988) (citing these cases and stating that “it is not self-evident that substituted service on a subsidiary is sufficient with respect to the parent”). Courts have denied attempts to assert personal jurisdiction as to a defendant contemplating the purchase of stock in a corporation with its principal place of business in the forum. *Southmark Corp. v. Life Investors, Inc.*, 851 F.2d 763, 773 (5th Cir. 1988). Moreover, the state of incorporation cannot claim quasi in rem jurisdiction merely on the basis of a shareholder's ownership of shares in the corporation. *Shaffer v. Heitner*, 433 U.S. 186, 213 (1977). The state of the principal place of business has no better claim to jurisdiction to adjudicate.

by all states without creating a conflict.¹²⁴ We call this the "universality" requirement. The proposed rule works as follows: Consider a statute claiming to permit corporations incorporated in the state or having fifty percent of their assets within the state to issue poison pill preferred stock.¹²⁵ Under our approach, this statute would be invalid because a corporation could be incorporated under one state's laws, but have most of its assets in another. Under such circumstances, both states could have the same legislation and assert jurisdiction, creating a conflict. By contrast, an assertion of jurisdiction solely on the basis of the state of incorporation would be valid, because a corporation is incorporated only in one state. Similarly, an assertion of jurisdiction solely on the basis of principal place of business would also be valid, because a corporation can only have one principal place of business.

The rule does not consider the ability to comply with both regulations. The bare ability to satisfy both states' regulations would lead to the displacement of state laws giving discretion to the corporation.¹²⁶ For example, if ability to comply with both regulations were the stan-

124. The formulation is similar to that of Kant's categorical imperative. See I. KANT, TUGENDLEHRE 388 (1797), translated in I. KANT, THE DOCTRINE OF VIRTUE 48 (M.J. Gregor trans. 1964) ("So act that the maxim of your action could become a universal law."); I. KANT, GRUNDLEGUNG ZUR METAPHYSIK DER SITTEN 52 (2d ed. 1803), translated in I. KANT, THE GROUNDWORK OF THE METAPHYSIC OF MORALS 88 (H.J. Paton trans. 1964) (same). For Kant, the categorical imperative served the purpose of providing a law for all rational beings, not just humans, without regard to their feelings, propensities, and desires. See I. KANT, KRITIK DER PRAKTISCHEN VERNUNFT 8-9 & 9 n.7 (1788), translated in I. KANT, THE CRITIQUE OF PRACTICAL REASON 8-9 & 9 n.7 (L. Beck trans. 1956). Our universality requirement serves the purpose of eliminating inappropriate assertions of jurisdiction without the need to pass judgment on the policies underlying the particular schemes by which a state asserts jurisdiction. Cf. *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 279-80 (1978) (declining to impose uniform rules for the taxation of interstate business because it would require the Court to consider political factors).

125. The Delaware Supreme Court has defined the term "poison pill" as referring to "a plan by which shareholders receive the right to be bought out by the corporation at a substantial premium on the occurrence of a stated triggering event." *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 180 (Del. 1986). In practice, a triggering event is the tender offer or the acquisition of a substantial portion of a corporation's stock by someone else. In that event, the right to be bought out reduces the value of the stock already purchased. See *Moran v. Household Int'l, Inc.*, 500 A.2d 1346, 1348 (Del. 1985). Other variations of the poison pill exist; all work by decreasing the value of the acquisition to the acquiror, either by diluting stock in the acquired company or by diluting stock in the acquiror. See R. CLARK, *supra* note 3, at 575.

126. This differs from the approach under the Supremacy Clause, U.S. CONST. art. VI, cl. 2. Congress, unlike a state, has undoubted power to displace state regulation. Because federal power is interstitial, however, "federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained." *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963).

dard, states with mandatory cumulative voting would have their rule apply despite the preference of other states for letting corporations decide for themselves whether to adopt cumulative voting.

The rule, however, does consider nonexclusivity. States may not wish to preclude other states' legislation. For example, a state could require reporting of corporations on the basis of presence of property, presence of shareholders, and state of incorporation. The state may not claim that its regulation is exclusive, and it may not object to other states' requiring additional reporting. When one state does not intend to make its assertion of jurisdiction to prescribe exclusive, no conflict arises and the test involved here will be satisfied.¹²⁷

Even liability-creating provisions may be nonexclusive, because one state may not intend to preclude an injured plaintiff from taking advantage of another jurisdiction's more favorable laws. In this respect the rule follows the Supreme Court's decisions in worker's compensation cases. In *Alaska Packers Association v. Industrial Accident Commission*,¹²⁸ the Court allowed California to apply its own worker's compensation law to an accident that took place in Alaska because the employment contract was entered into in California. In a subsequent case, *Pacific Employers Insurance Co. v. Industrial Accident Commission*,¹²⁹ the employee resided in and entered into the contract of employment in Massachusetts, but the Court upheld the application of California law because California was the place of the injury. The *Alaska Packers* Court noted that the California statute did not evince an intent to preclude the employees from relying on law elsewhere if they chose.¹³⁰ The plaintiff's ability to choose between two forums in *Alaska Packers* and *Pacific Employers Insurance* is consistent with the analysis suggested here. In those cases, neither California nor Alaska had a policy barring the plaintiff from suing in the other state.¹³¹ States may not wish to limit

127. The New York statutes appear to satisfy this requirement. N.Y. BUS. CORP. LAW §§ 1306, 1315-1320 (McKinney 1986) (imposing disclosure requirements on foreign corporations and setting forth liability rules governing them).

128. 294 U.S. 532 (1935).

129. 306 U.S. 493 (1939).

130. We assume that in Alaska the employee, had he chosen to do so, could have claimed the benefits of the Alaska statute, and that if any effect were there given to the California statute, it would be only by comity or by virtue of the full faith and credit clause.

294 U.S. at 540.

131. Although the Supreme Court's determination that these statutes are nonexclusive is only a matter of interpretation, it is sound interpretation. Worker's compensation statutes are primarily remedial. No doubt interpretation of the statutes as not intending to be exclusive is fortified by their limitation to remedial rights, not primary rights. Cf. *Hanna v. Plumer*, 380 U.S. 460, 474 (1965) (Harlan, J., concurring) (distinguishing between primary planning activi-

recovery to the amount provided for by their laws.

While the Court has not considered an analogous case arising under common law, there is little doubt that courts apply conflict of laws rules in such cases to favor the plaintiffs. This is because tort rules generally combine two motives, deterrence and compensation. The state of the situs of the accident cannot object if the parties' domicile wishes to deter conduct by providing a greater recovery for the plaintiff.¹³² Conversely, the strong compensatory motives underlying most of modern tort law suggest that the compensatory goals of the plaintiff's forum choice be preferred if the primary purpose of the tort rule in question is to compensate victims for their injuries.¹³³ Under the liberal test for approving state decisions in choice of laws, these state rules for choosing law will be approved.¹³⁴ Worker's compensation tribunals, however, will not apply choice of law doctrines.¹³⁵ Thus, the only way to choose laws in a worker's compensation case is to choose jurisdictions. *Alaska Packers* and *Pacific Employers Insurance* simply achieve the same result that could have been achieved under a common law system for choice of laws in a case in which the forum only applies its own laws.

Because a nonexclusive regulation is not subject to invalidation under the internal consistency requirement, legislatures may label their regulations as nonexclusive to give them extraterritorial effect. This labelling is unlikely to create difficulties in practice. First, the label that a legislature attaches to a statute is not conclusive. Courts should engage in the same analysis the Supreme Court used in *Alaska Packers*.¹³⁶ A statute's effect may necessarily be exclusive. For example, it may provide for mandatory cumulative voting in elections to the board of directors.

ties and those not influenced by legal rules). This makes any claim by an employer that it was relying on the exclusivity of one state's remedy implausible.

132. See, e.g., *Hurtado v. Superior Court*, 11 Cal. 3d 574, 580-81, 522 P.2d 666, 670, 114 Cal. Rptr. 106, 110 (1974); *Johnson v. Spider Staging Corp.*, 87 Wash. 2d 577, 582-83, 555 P.2d 997, 1002 (1976).

133. See, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 comment c (1971); *Grant v. McAuliffe*, 41 Cal. 2d 859, 866-67, 264 P.2d 944, 949 (1953) (Traynor, J.) (citing compensatory purposes of tort law in characterizing the survivability of a claim against a tortfeasor as procedural in order to allow the plaintiff's claim to proceed); *Babcock v. Jackson*, 12 N.Y.2d 473, 482, 191 N.E.2d 279, 284, 240 N.Y.S.2d 743, 750 (1963).

134. "[F]or a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981) (plurality opinion), quoted in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985).

135. RESTATEMENT (SECOND) OF CONFLICT OF LAWS, ch. 7, topic 3 introductory note (1971) ("A peculiarity of the area [of worker's compensation] is that usually relief under a particular statute may be obtained only in the state of its enactment.").

136. 294 U.S. 532 (1935).

Such a statute is inconsistent with statutes prohibiting cumulative voting or permitting corporations to choose other methods of voting. A legislature cannot avoid the effect of the internal consistency requirement by labelling the statute nonexclusive. Second, the structure of the universality requirement provides a disincentive to label one's preferences falsely. If State *X* treats its rule as nonexclusive, another state's regulations will be enforceable even in State *X* because State *X*'s statute does not preclude the other law.

More fundamental problems occur when one state is genuinely willing to treat its law as nonexclusive, but other states oppose the nonexclusive label because they perceive the law to have undesirable substantive effects. For example, State *X* might view its disclosure regulations as nonexclusive and be willing to accept other states' disclosure regulations. Other states, however, may believe that State *X*'s disclosure regulations discourage takeovers by minimizing the value of identifying a company whose value could be improved by better management.¹³⁷ Because these states view State *X*'s regulation as having adverse substantive effects, they will reject the nonexclusive characterization of these disclosure regulations. States that consider limited disclosure to embody a substantive policy about the benefits of disclosure will have to treat their regulations as exclusive. Thus, their rules about disclosure must satisfy the internal consistency requirement. This will limit the possibility of conflicts.

Suppose, however, that State *X* believes in broad disclosure and has enacted nonexclusive legislation requiring broad disclosure whenever a corporation is incorporated in or has its principal place of business in State *X*. State *Y* permits limited disclosure as a substantive policy. It enacts legislation to govern corporations incorporated in the state that allows management to limit disclosure. A corporation that is incorporated in State *Y*, but has its principal place of business in State *X*, will be subject to conflicting demands.

There are two possibilities within the framework of the internal consistency requirement. First, a regulation domestically treated as nonexclusive could be treated universally as nonexclusive. This promotes the interests of nonexclusive regulators over those of exclusive regulators. While this is a different kind of bias than the one against states that prefer to confer discretion on the corporation, such a rule will tend to promote the interests of one class of regulators: states favoring disclosure requirements and other rules that can be seen as nonexclusive. One argument in favor of such a result is that it satisfies at least an equal number

137. R. CLARK, *supra* note 3, at 590 (discussing the possibility that disclosure would give rival bidders a free ride on others' search efforts).

of states as the other requirements. Only one state's exclusive regulations necessarily can be satisfied, but all nonexclusively regulating states concerned may have their regulations satisfied.

Alternatively, a regulation domestically treated as exclusive could be treated universally as exclusive. This would treat the nonexclusive regulation as exclusive. If this result is adopted, it may be reasonable to allow states favoring disclosure to enact a fallback position that would govern conflicts with states that have exclusive regulations. The fallback position would state a ground for priority. For example, a state could say that its regulation was generally to be treated as nonexclusive, but that if it came into conflict with another state's exclusive regulation, it would prefer to regulate on the basis of the principal place of business. Of course, this solution would not eliminate the possibility of conflicts. In the example given above, if State *X* prefers to regulate on the basis of principal place of business, the conflict will continue.

We believe that for purposes of the universality requirement, a state's characterization of its regulations as exclusive should govern. Otherwise, the strongly held concerns of the state with most ties to the corporation could have its laws displaced by the laws of a state with only a minor connection to the corporation. This leaves the problem to be resolved under conventional conflict of laws rules.¹³⁸

Another problem occurs when one state is able to regulate on the basis of internal events, but the regulation has substantial external consequences. No doubt a state may regulate the transfer of property within the state, even if the property is owned by a foreign corporation, without violating the internal consistency requirement. For example, a state may legitimately enact laws to protect creditors against bulk sales without worrying about the impact of the law on foreign corporations.¹³⁹ Because the laws' effects are confined to property located in the state and

138. Under those rules, it is improbable that the state of incorporation could displace the law of other states merely by being the state of incorporation. First, the interests of all states favoring disclosure would be aggregated. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 comment i (1971) (torts); *id.* § 186 comment c (torts). Second, the principle underlying the internal affairs doctrine is primarily one of preventing inconsistency and unfair surprise, not the state of incorporation's interest in regulating the corporation. *Shaffer v. Heitner*, 433 U.S. 186, 215 n.44 (1977). Third, when protective laws are concerned, courts are reluctant to displace the law of concerned states through the stipulation of a governing law. See *supra* note 8. These principles suggest that the courts will refuse to allow a corporation to claim the protection of a doctrine designed to avoid uncertainty when the corporation's own actions in incorporating in a jurisdiction without any ties to the activities of the corporation created the uncertainty.

139. Typical bulk sales laws are based on article 6 of the Uniform Commercial Code. U.C.C. art. 6 (1972).

the state accepts the application of other states' laws to property located elsewhere, it passes the internal consistency requirement.

Anti-takeover legislation frequently limits the corporation's ability to alienate assets after a takeover.¹⁴⁰ Other anti-takeover statutes require foreign corporations that have been acquired against the wishes of the incumbent board to confer special benefits on employees.¹⁴¹ If the laws' effects were confined to employees and property located in the state and the state accepted the application of other states' laws to property located elsewhere, the law might be thought to satisfy the universality requirement. One defending the validity of these statutes might argue that they apply only to employees or property located in the state. Thus, the argument would continue, it passes muster under the universality requirement even though these states generally regulate corporations according to their state of incorporation.

However, this is not the case. The statutes base their effect on a change of status (the acquisition of stock) with extraterritorial connections. The concern of the states adopting such legislation is not the welfare of creditors and employees generally, because these statutes do not apply to corporations generally. Consequently, the purpose of these statutes is to penalize on the basis of actions that could not be regulated directly. This is invalid.¹⁴²

The resolution of the attempts to regulate on the basis of property illustrates that the internal consistency requirement, like ordinary conflict of laws rules, will rely on *depeceage* to be workable.¹⁴³ Secured transactions and bulk sales may be regulated by the state in which the

140. *E.g.*, WASH. REV. CODE § 23B.19.040 (1989) (prohibiting significant business transactions following an acquisition unless the transaction was approved by the board before the acquisition); *id.* § 23B.19.020(9)(a) (defining significant business transaction to include dispositions of five percent or more of the target corporation's assets).

141. Act of Apr. 27, 1990, Act No. 1990-36, sec. 6, §§ 2581-2588, 1990 Pa. Legis. Serv. 114-18 (Purdon) (to be codified at 15 PA. CONS. STAT. §§ 2581-2588). "Registered corporations" are defined to include domestic corporations and their subsidiaries. 15 PA. CONS. STAT. § 2502 (Purdon Supp. 1990) (as amended by Act of Apr. 27, 1990, Act No. 1990-36, sec. 4, § 2502, 1990 Pa. Legis. Serv. 100 (Purdon)). The provisions protecting employees expressly extend to foreign subsidiaries of registered corporations. Act of Apr. 27, 1990, Act No. 1990-36, sec. 6, §§ 2581, 2585(a), 1990 Pa. Legis. Serv. 115, 117 (Purdon) (to be codified at 15 PA. CONS. STAT. §§ 2581 (defining eligible employees as employees of a registered corporation or of a subsidiary of a registered corporation), 2585(a) (covering registered corporations and their subsidiaries)).

142. *See supra* notes 70-72 and accompanying text (states cannot condition consent to doing business on demands that interfere with the rights of other states); L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-14, at 439 n.5 (2d ed. 1988) (noting source of the modern doctrine of unconstitutional conditions in the cases discussed *supra* notes 70-72).

143. *Broome v. Antlers' Hunting Club*, 595 F.2d 921, 923 n.5 (3d Cir. 1979) (defining *depeceage* as "the process whereby different issues in a single case arising out of a single set of

property involved is located without forcing that state to regulate on the basis of property, rather than domicile, as to all transactions.

Procedural issues are governed by the same principles used for the remaining analysis. When an issue is truly procedural, in the sense that it can have no effect on an outcome,¹⁴⁴ there can be no objection to having any state's law govern, so long as it is clear which state's law governs. If a bias in favor of the state of incorporation for procedural issues exists, there would be controversy over what issues qualified as procedural.¹⁴⁵ This controversy is especially likely because it is impossible to establish a neutral election procedure.¹⁴⁶ The need to have a clearly applicable law is more pressing in the area of procedure than elsewhere because of the need to know who has authority to make decisions for the corporation. This suggests the need to determine a procedure relatively quickly, even at the cost of some arbitrariness.¹⁴⁷ Fortunately, states do not seem ea-

facts are decided according to the laws of different states" (citing R. LEFLAR, *supra* note 31, at 221)).

144. A purely procedural rule may be described as one that can be satisfied so long as one knows in advance what the rule requires. With purely procedural rules either in conflicts under *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), or in horizontal conflicts, there will generally be an obvious rule to apply. This may not be the case in conflicts between the laws of the state of incorporation and the state of the principal place of business.

145. A variety of apparently procedural rules have nonprocedural implications. For example, cumulative voting and staggered terms for boards of directors may initially be adopted out of a sense of fairness or to preserve continuity in management. These same provisions also will have a predictable substantive effect in a hostile takeover.

Other rules may turn out to affect a takeover, although it may be impossible to determine whom the rules favor in advance. For example, long or short notice for stockholder meetings may permit adoption of devices designed to stymie a takeover, but may make it possible for someone who does acquire a majority control to remove incumbent management quickly. Rules for multicandidate director elections, the principle example of the effect that election rules can have on results, also fall in such a category. K.J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* ch. 2 (2d ed. 1963). Thus, we believe that the cases refusing to defer to arguably procedural rules with substantive consequences are correct. *Western Air Lines, Inc. v. Sobieski*, 191 Cal. App. 2d 399, 12 Cal. Rptr. 719 (1961) (applying California law to a Delaware corporation to prevent the corporation from eliminating cumulative voting); *Wilson v. Louisiana-Pacific Resources, Inc.*, 138 Cal. App. 3d 216, 187 Cal. Rptr. 852 (1983) (applying California's cumulative voting law to a Utah corporation although the corporation's articles of incorporation and bylaws did not provide for cumulative voting).

146. K.J. ARROW, *supra* note 145; R.D. LUCE & H. RAIFFA, *GAMES AND DECISIONS*, ch. 14 (1958). If such a procedure existed, a legislature could mandate it constitutionally in multi-state cases.

147. The cases suggest that states may have a duty quickly to inform foreign corporations that the state will seek to govern them by domestic law. In *Order of United Commercial Travelers of Am. v. Wolfe*, 331 U.S. 586 (1947), the Court held that the forum state could not use its own statute of limitations when that was inconsistent with the articles of incorporation of a fraternal benefit organization. The case suggests that, while a state might deny such a corporation admittance, it could not "recognize an action to collect the full benefits to be derived from a membership in the petitioner society, while, at the same time, nullifying other

ger to propose revisions of purely procedural rules in their efforts to prevent takeovers.

B. Benefits of the Universality Requirement

The proposed rule satisfies a number of important criteria. First, it respects the constitutional and practical limits on judicial action. The courts do not generally review the policy basis of state anti-takeover legislation.¹⁴⁸ Unfortunately, determining the priority of different states' legislation with respect to corporate transactions requires evaluating and balancing the conflicting policies underlying state laws.¹⁴⁹ To minimize judicial scrutiny of the substantive policies of the states, any rule for determining which state's law governs should, if possible, be neutral with respect to the substantive laws of the states. This rule satisfies this requirement by avoiding consideration of state policies. This preserves a maximum of state autonomy.¹⁵⁰

Because the rule only requires looking at the face of a statute, it reduces the burdens on the Supreme Court. This has long been a concern.¹⁵¹ It also minimizes the likelihood of incorrect results. Assessing state policies requires the Court to apply unfamiliar state laws and unfamiliar and complex state conflict-of-laws doctrines. The simplicity of the proposed rule avoids these difficulties. It also avoids committing the Supreme Court to a particular theory of conflict of laws on a constitutional level before sufficient experience has determined the most appropriate rules.¹⁵²

integral terms of the same membership." *Id.* at 624-25; *see also id.* at 632 (Black, J., dissenting) ("South Dakota officials could have excluded this corporation from doing business in the state or could have revoked its license upon discovery of the foreign corporations violations of the laws of the state.").

148. *See CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 92 (1987) (declining "to second-guess the empirical judgments of lawmakers concerning the utility of legislation" with respect to corporate takeovers (quoting *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 679 (1981) (Brennan, J., concurring))).

149. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(b), (c) (1971).

150. In the analogous area of state taxation, Justice Stevens observed that a scheme to prevent duplicative taxation would require "national uniform rules for the division of income." *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 279 (1978). Although such a scheme would advance the policies of the Commerce Clause, any particular scheme would require a decision based in part upon political factors. *Id.* Such policy decisions are appropriate for the Congress, not the Court. *Id.* at 280.

151. *See Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 176 & n.15 (1983); *Dodd, supra* note 8, at 562 (questioning the Supreme Court's ability to introduce uniformity without burdening itself with a flood of unimportant litigation).

152. "If we abandon the currently applied, traditional notions of such entitlement [to legislate,] we would embark upon the enterprise of constitutionalizing choice-of-law rules with no compass to guide us beyond our own perceptions of what seems desirable." *Sun Oil Co. v.*

Second, it is predictable. One of the main reasons for requiring a principled solution to the conflict of laws problem is to facilitate the planning of transactions.¹⁵³ A test that produces highly indeterminate results would not serve that purpose.¹⁵⁴ The comparative predictability of the rule has beneficial results in public as well as private planning. Because it provides a clear and predictable rule, legislatures can decide when state policies require the assertion of jurisdiction and gives them some ability to be sure their enactments are valid.

Finally, approaching the problem of conflicting regulation under the Full Faith and Credit Clause allows Congress to act.¹⁵⁵ The rule that the enforceability of public acts depends on their enforceability in the state of rendering is only a statutory rule, which Congress can modify.¹⁵⁶ By contrast, decisions under the Due Process Clause leave little scope for congressional revision.¹⁵⁷

This test has its limits. Most obviously, states can still maintain different laws that will create jurisdictional conflicts. The failure of the test to resolve all conflicts, however, is hardly an appropriate objection to using it to invalidate assertions of jurisdiction to prescribe that inherently generate conflicts. Cases not resolved through the universality requirement will have to be resolved through the application of conventional choice of law rules. The constitutional limits imposed on states in such a case are relatively few.¹⁵⁸ The Court currently recognizes that a situa-

Wortman, 486 U.S. 717, 727-28 (1988). "In a rapidly developing area, such as choice of law, it is often more important that good rules be developed than that predictability and uniformity of result should be assured through continued adherence to existing rules." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 comment i (1971).

153. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(f) (1971). "Predictability and uniformity of result are of particular importance in areas where the parties are likely to give advance thought to the legal consequences of their transactions." *Id.* comment i.

154. Unfortunately, much of the area of conflict of laws is necessarily uncertain. The main section outlining principles of conflicts, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971), requires application of a multi-factor balancing test. This "leaves the answer to specific problems very much at large" and "recogniz[es] that there may be room for different solutions." RESTATEMENT (SECOND) OF CONFLICT OF LAWS introduction vii (1971).

155. The Clause expressly provides for congressional action to determine the effect of extraterritorial "public Acts, Records, and Proceedings." U.S. CONST. art. IV, § 1.

156. *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 273 (1935).

157. In *ASARCO Inc. v. Idaho State Tax Comm'n*, 458 U.S. 307 (1982), the Court relied on the Due Process Clause. As the dissent charged, 458 U.S. at 331 (O'Connor, J., dissenting), and the majority acknowledged, 458 U.S. at 327 n.23, this suggested that limits on state power to tax could not be altered by Congress.

158. "[I]n many situations a state court may be free to apply one of several choices of law." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 823 (1985). However, an attempt by a state to

tion in which more than one state's law can be applied is the norm.¹⁵⁹ Indeed, deference to state rules of choice of law is part of accepted Supreme Court jurisprudence, even when it would not be necessary to rely on constitutional grounds to adopt different rules.¹⁶⁰ The combination of the universality requirement with traditional approaches to choice of laws, however, has the advantage of invalidating both assertions of jurisdiction that are facially invalid because they seek to regulate transactions according to a rule that inherently generates conflicts and assertions of jurisdiction that are unreasonable as applied.¹⁶¹ The Full Faith and

regulate transactions involving only out-of-state shareholders and an out-of-state corporation is invalid. *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 93 (1987).

Other constitutional limitations in takeover situations generally will not depend on the multi-state nature of the transaction. However, certain policies against disappointment of contractual expectations may apply with added force in the multi-state situation. Initially, corporate charters were contracts that could not be modified by the states granting them. *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 643-44 (1819). This prohibition could be avoided by the states' reserving the power to modify the charter. *See Salt Co. v. East Saginaw*, 80 U.S. (13 Wall.) 373, 378 (1872). It may be argued that because a non-incorporating state has not reserved the power to modify the contract, an alteration of the contract that reduces the rights of shareholders is more likely to violate the Contract Clause. U.S. CONST. art. I, § 10, cl. 1.

States also may have more power to alter contracts initially regulated by their law than they do contracts associated with other states. *Compare* *Order of United Commercial Travelers of Am. v. Wolfe*, 331 U.S. 586, 624-25 (1947) (a state may deny a fraternal benefit corporation admittance, but it could not alter the terms of the contract of a shareholder-beneficiary by "recogniz[ing] an action to collect the full benefits to be derived from a membership in the petitioner society, while, at the same time, nullifying other integral terms of the same membership" by refusing to apply the organization's limitation period to a domiciliary) *and* *Home Ins. Co. v. Dick*, 281 U.S. 397, 408-09 (1930) (the forum could not apply its law prohibiting a shortening of the time in which suit could be brought under an insurance contract absent some other connection with the transaction) *with* *Sun Oil Co. v. Wortman*, 486 U.S. 717, 724-27 (1988) (the forum may apply its own statute of limitations to a suit with no other connection to the forum) *and* *Home Ins. Co.*, 281 U.S. at 407 (state may prohibit contractual terms in contracts within the state) *and* *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 206-07 (1819) (a jurisdiction may alter the limitations period on a contract) *and* *Campbell v. Holt*, 115 U.S. 620, 628-29 (1885) (same).

159. "[S]ince the legislative jurisdictions of the States overlap, it is frequently the case under the Full Faith and Credit Clause that a court can lawfully apply either the law of one State or the contrary law of another." *Sun Oil Co. v. Wortman*, 486 U.S. 717, 727 (1988).

160. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941) (requiring federal courts to follow state conflicts rules in diversity cases); *Day & Zimmerman, Inc. v. Challoner*, 423 U.S. 3, 4 (1975) (re-affirming *Klaxon*).

161. For example, when the fact of incorporation is the sole contact with the state of incorporation, a state that is the source of all the other contacts of the corporation will have a strong claim to apply its law. *See, e.g.,* *Wilson v. Louisiana-Pacific Resources, Inc.*, 138 Cal. App. 3d 216, 221, 187 Cal. Rptr. 852, 855 (1983) (applying California's cumulative voting law, because the corporation's sale, payroll, and property each were at least 50% in California, to a Utah corporation although the corporation's articles of incorporation and bylaws did not provide for cumulative voting). Conversely, when many states share the business facilities of the corporation, the claim of the state of incorporation is especially strong.

Credit Clause expressly allows Congress to address any further difficulties.

C. Consistency With Past Decisions of the Supreme Court

The rule we suggest here, while extending past full faith and credit decisions, is consistent with the Court's understanding of the Full Faith and Credit Clause, its resolution of conflicts created by state taxing schemes under the Commerce Clause, and its choice-of-law approach in federal common law. Moreover, this approach is consistent with two broad themes underlying the Court's resolution of other problems arising from the existence of multiple jurisdictions in a federal system.

First, it is consistent with the Court's commitment to a policy-neutral application of the law. That commitment requires a mechanism whereby the Court can assess the legitimacy of legislation without regard to its content. The Court has frequently expressed its reluctance to assess the merits of the policy decisions on which the legislation is based.¹⁶²

Second, this approach is consistent with the Court's decreased reliance on presence and its increased reliance on policy considerations. In part this comes from the Court's realization that rules adopted to resolve conflicts of laws between countries, for which there are no mechanisms for coordination between political units, provide an inappropriate model for federal jurisdictions.¹⁶³ The advantage of a unified system is that it allows the courts to focus more on fairness and convenience.

1. Tax Cases Under the Commerce Clause

Cases interpreting the taxing power of the states under the Commerce Clause present problems similar to those arising in cases determining jurisdiction to prescribe under the Full Faith and Credit Clause. One reason for this similarity is that the taxing power is simply a special case of the power to prescribe.

Second, the analysis of taxing power under the Commerce Clause is quite similar to that under the Full Faith and Credit Clause. In the case

162. See *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 92 (1987) (declining "to second-guess the empirical judgments of lawmakers concerning the utility of legislation" with respect to corporate takeovers (quoting *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 679 (1981) (Brennan, J., concurring))). "When the action of a Legislature is within the scope of its power, fairly debatable questions as to its reasonableness, wisdom, and propriety are not for the determination of courts, but for the legislative body . . ." *South Carolina State Highway Dep't v. Barnwell Bros. Co.*, 303 U.S. 177, 190-91 (1938).

163. This is shown by the difference in treatment of the Interstate Commerce Clause, in which the Supreme Court is able to reconcile the claims of different states, and the Foreign Commerce Clause, in which there is no mechanism for reconciling the claims of different countries. See *infra* note 179 and accompanying text.

of the Commerce Clause, the taxing jurisdiction must show a “ “minimal connection” or “nexus” between the interstate activities and the taxing State, and “a rational relationship between the income attributed to the State and the intrastate values of the enterprise.” ’ ’¹⁶⁴ This test is similar to the significant connection test used under the Full Faith and Credit Clause,¹⁶⁵ albeit with an added element of apportionment. Indeed, the Court has equated the commerce clause test with that under the Due Process Clause,¹⁶⁶ which the Court has in turn equated with the Full Faith and Credit Clause.¹⁶⁷

Third, both the Commerce Clause and the Full Faith and Credit Clause present areas in which the Court’s decisions can be changed by Congress. They thus represent an area in which the Court legitimately can defer substantive policy choices to Congress. This ability to defer suggests a similar need for content-neutral rules.

Formerly, the ability of a state to tax extraterritorial entities was based on the presence of the property in the state.¹⁶⁸ While states could

164. *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 165-66 (1983) (quoting *Exxon Corp. v. Wisconsin Dep’t of Revenue*, 447 U.S. 207, 219-20 (1980) (quoting *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 436-37 (1980) (minor alteration by *Exxon Court*))).

165. See *supra* note 134.

166. *Container Corp.*, 463 U.S. at 164 (quoting *ASARCO Inc. v. Idaho State Tax Comm’n*, 458 U.S. 307, 315 (1982)).

167. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985) (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981) (plurality opinion)). The rationale of the tax cases, however, is “the principle that no State may discriminate against interstate commerce by enacting a tax which provides a competitive advantage to local business.” *American Trucking Ass’n, Inc. v. Scheiner*, 483 U.S. 266, 269 (1987). *Scheiner* describes the conflicting policies as “unrestricted access to the national market” and “each State’s authority to collect its fair share of revenues from interstate commercial activity.” *Id.* This explanation of the source of commerce clause power is sufficiently different from the source of power under the Full Faith and Credit Clause to suggest that the coincidence in standards should not be relied upon. However, the Full Faith and Credit Clause requires, at the least, adherence to due process. See *supra* note 8. Consequently, the difference in the source of the standards is irrelevant.

168. “It is . . . essential to the validity of a tax that the property shall be within the territorial jurisdiction of the taxing power.” *Union Refrigerator Transit Co. v. Kentucky*, 199 U.S. 194, 204 (1905). “Personal property, as this court has declared again and again, may be taxed, either at the domicile of its owner, or at the place where the property is situated, even if the owner is neither a citizen nor a resident of the state which imposes the tax.” *Savings & Loan Soc’y v. Multnomah County*, 169 U.S. 421, 427 (1898) (citations omitted).

The *Union Refrigerator* Court noted an exception for “intangible property,” as to which there is no way that “its existence or ownership can be ascertained in the State of its situs.” 199 U.S. at 205. In such cases, “the property may be taxed at the domicile of the owner,” *id.*, or, “in the case of mortgages, in the State where the property is retained.” *Id.* The Court rejected an attempt by the state to tax a domestic corporation on tangible personal property located in other states. *Id.* at 201, 211.

tax foreign corporations on their tangible property in the state,¹⁶⁹ states could not tax corporations on any value associated with the corporation that was not represented by tangible property, because this would represent an impermissible tax on interstate commerce.¹⁷⁰ The tie to power over the person or thing being taxed was reinforced by authorities holding that a judgment for taxes was unenforceable in another state.¹⁷¹

The rule that a state could not tax a foreign corporation because it engaged in interstate commerce within the state was evaded through the device of valuing the physical assets of the corporation fixed within the state, as to which the state's jurisdiction to tax was unchallenged, by apportioning the overall value of a company, as reflected in its stock price, among physical assets.¹⁷² It eventually became clear that the limits imposed by the Supreme Court were linguistic, not substantive.¹⁷³ At that point, the Supreme Court abolished its old requirements and established a generalized test of fairness. Under the Supreme Court's current approach, a state tax on interstate commerce does not offend the Commerce Clause "when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided

169. *Leloup v. Port of Mobile*, 127 U.S. 640, 649 (1888).

170. [N]o state has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress.

Leloup v. Port of Mobile, 127 U.S. 640, 648 (1888); accord *Philadelphia & Southern S.S. Co. v. Pennsylvania*, 122 U.S. 326, 344 (1887). Similar rules applied for federal agencies and instrumentalities. "All subjects over which the sovereign power of a state extends, are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 429 (1819). Therefore, the state could not tax a federal instrumentality. *Id.* at 428-31.

Even more restrictive rules applied for ships, which could only be taxed at their home port. *Hays v. Pacific Mail S.S. Co.*, 58 U.S. (17 How.) 596, 599-600 (1855). *Hays* has since been restricted to cases of oceanic navigation. *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169, 173-74 (1949) (allowing an apportioned tax on vessels moving in inland waters); *Standard Oil Co. v. Peck*, 342 U.S. 382 (1952) (refusing to allow the state that incorporated the corporation owning vessels and in which the vessels were registered to tax on an unapportioned basis). *Peck* held that "[t]he rule which permits taxation by two or more states on an apportionment basis precludes taxation of all of the property by the state of the domicile." *Id.* at 384. The Court restricted the home port doctrine to cases of oceanic navigation. *See id.*

171. *See, e.g.*, RESTATEMENT OF CONFLICT OF LAWS §§ 443, 610 comment c (1934). *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 279 (1935), held that a sister state judgment for taxes must be enforced, expressly rejecting earlier cases in lower courts to the contrary, *see id.* at 274 & nn.2-3, and the position taken by the *Restatement*, *see id.* at 279 n.4.

172. *See Adams Express Co. v. Ohio State Auditor*, 165 U.S. 194, 220 (1897).

173. *See, e.g.*, *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 281 (1977) (describing the former rule as being "one of draftsmanship and phraseology").

by the State.”¹⁷⁴ Under this approach, the Court allows a tax on gross receipts of foreign corporations so long as it is fairly apportioned between jurisdictions.¹⁷⁵

Two developments limit this expansion of state power to tax. First, in expanding state power to tax, the Court has increasingly erected requirements of apportionment or reasonableness. In *American Trucking Associations, Inc. v. Scheiner*, the Court created a major restriction on states’ power to tax beyond their borders, a requirement of consistency. “To pass the ‘internal consistency’ test, a state tax must be of a kind that, ‘if applied by every jurisdiction, there would be no impermissible interference with free trade.’”¹⁷⁶ This inconsistency is a hypothetical test. “[T]he actual imposition of flat taxes by other jurisdictions is not necessary to sustain the Commerce Clause challenge . . . under the ‘internal consistency’ test”¹⁷⁷ This requirement is recent. As Justice O’Connor has observed, “Creating an ‘internal consistency’ rule of general application is an entirely novel enterprise that the Court undertakes for the first time in this case.”¹⁷⁸

Second, the expansion of state power to tax has been predicated on the availability of the Court to reconcile potentially inconsistent demands for taxes. When the Court is unavailable to mandate a scheme of apportionment, it has reverted to the old principles of allowing a tax on tangible property only by the state where the property is registered. This can be seen in cases in which both the Foreign Commerce and the Domestic Commerce Clauses are raised, such as *Japan Line, Ltd. v. County of Los Angeles*.¹⁷⁹ In *Japan Line*, California attempted to tax containers temporarily present in California that were used solely in foreign commerce, that were owned by Japanese companies, and that had their home ports in Japan.¹⁸⁰ The Court recognized that the tax might satisfy any appor-

174. *Id.*; see also *Amerada Hess Corp. v. Director, Div. of Taxation*, N.J. Dep’t of the Treasury, 490 U.S. 66 (1989).

175. *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 169 (1983).

176. *American Trucking Ass’ns, Inc. v. Scheiner*, 483 U.S. 266, 284 (1987) (quoting *Armco Inc. v. Hardesty*, 467 U.S. 638, 644 (1984)).

177. *Id.* at 285.

178. *Id.* at 303 (O’Connor, J., dissenting); see also *Tyler Pipe Indus., Inc. v. Washington Dep’t of Revenue*, 483 U.S. 232, 255-56 (1987) (Scalia, J., dissenting). The remarks of Justices O’Connor and Scalia betray a lack of historical perspective. First, the Court mandated apportionment for vessels as early as *Standard Oil Co. v. Peck*, 342 U.S. 382, 384 (1952), which refused to allow the state that incorporated the corporation owning vessels and in which the vessels were registered to tax the vessels on an unapportioned basis. Second, it is only the Court’s broadening of states’ powers to tax that makes it essential that some other, albeit less restrictive, means be used to keep state conduct within its proper sphere.

179. 441 U.S. 434 (1979).

180. *Id.* at 436.

tionment requirement under the tests used for domestic commerce.¹⁸¹ However, the Court rejected the argument "that the Commerce Clause analysis is identical, regardless of whether interstate or foreign commerce is involved,"¹⁸² because the Court could enforce a requirement of apportionment in the United States,¹⁸³ but could not reconcile the claims of American and foreign jurisdictions.¹⁸⁴ Because the Court could not enforce an apportionment scheme, it resorted to the mechanical factors of ownership and registration of the cargo containers, by stating that the nation where the "containers are owned, based, and registered" "has the right to tax the containers in full."¹⁸⁵

By contrast, when corporate boundaries are concerned, the Court is willing to permit apportionment, at least when the parent corporation is American.¹⁸⁶ In *Container Corp. of America v. Franchise Tax Board*, the Court permitted a tax on foreign subsidiaries of domestic corporations.¹⁸⁷

The taxing cases support our suggestion with respect to the Full Faith and Credit Clause in a number of ways. First, the Court's holding in *Tyler Pipe* overrules earlier decisions,¹⁸⁸ showing that the possibility of inconsistency is all that is required. Our rule relies on a similar analysis

181. *Id.* at 445.

182. *Id.* at 446. This was the first recognition of the distinction between interstate and foreign commerce.

183. "The basis for this Court's approval of apportioned property taxation, in other words, has been its ability to enforce full apportionment by all potential taxing bodies." *Id.* at 447.

184. Due to the absence of an authoritative tribunal capable of ensuring that the aggregation of taxes is computed on no more than one full value, a state tax, even though "fairly apportioned" to reflect an instrumentality's presence within the State, may subject foreign commerce "to the risk of a double tax burden to which [domestic] commerce is not exposed, and which the commerce clause forbids."

Id. at 447-48 (quoting *Evco v. Jones*, 409 U.S. 91, 94 (1972) (quoting *J.D. Adams Mfg. Co. v. Storen*, 304 U.S. 307, 311 (1938)) (alteration by *Japan Line* Court)). "In interstate commerce, if the domiciliary State is 'to blame' for exacting an excessive tax, this Court is able to insist upon rationalization of the apportionment. As noted above, however, this Court is powerless to correct malapportionment of taxes imposed from abroad in foreign commerce." *Id.* at 454.

185. *Id.* at 451-52. A state would not have had the right to tax on an unapportioned basis merely because it had incorporated the corporation owning the property and was the state in which they were registered. See *Standard Oil Co. v. Peck*, 342 U.S. 382, 384 (1952).

186. *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 185 (1983), recognized the continued validity of *Japan Line*: "Although consistent application of the fair apportionment standard can generally mitigate, if not eliminate, double taxation in the domestic context, 'neither this Court nor this Nation can ensure full apportionment when one of the taxing entities is a foreign sovereign.'" *Container Corp.*, 463 U.S. at 185-86 (quoting *Japan Line*, 441 U.S. at 447). It distinguished, however, between property and income taxes. *Id.* at 188.

187. 463 U.S. 159, 163 (1983).

188. 483 U.S. 232, 248 (1987) (expressly overruling *General Motors Corp. v. Washington*, 377 U.S. 436, 439 (1964)); see also *id.* at 255 (Scalia, J., dissenting) (listing overruled decisions).

under the Full Faith and Credit Clause. In both areas, such a test avoids the need for the Supreme Court to commit itself to one particular method, whether it is a particular rule determining which state's law governs or a particular rule apportioning taxes. The Court often has noted its reluctance to commit itself to one method of apportionment in the tax cases¹⁸⁹ and has refused to require one theory of choice of law in the conflicts cases.¹⁹⁰ Furthermore, a consistency test limits de novo adjudication of questions of fact, something that has also concerned the Supreme Court in both the tax cases¹⁹¹ and the full faith and credit cases.¹⁹²

More generally, the cases dealing with power to tax, particularly *Japan Line's* rejection of the use of tests based on interstate commerce in the area of foreign commerce, demonstrate a growing awareness of the role of the Court in apportioning taxes, which makes older precedents drawn from the allocation of power to tax among independent nations irrelevant. These same older precedents underlie the Court's unwillingness to police states' choices in the area of conflict of laws.

Finally, the Court's reluctance in *Container Corp.* to attribute conclusive weight to corporate structures in allocating income, even in the area of foreign subsidiaries of American corporations, may indicate the Court's understanding of the manipulability of the corporate form. The Court's willingness to pierce corporate structures for tax purposes suggests that the Court would not attach conclusive weight to the internal affairs doctrine in deciding what state should regulate corporations.

2. Recognition of Judgments

The cases dealing with extraterritorial recognition of judgments under the Full Faith and Credit Clause and its implementing statutes¹⁹³ adopt what we call an indirectness principle: A court cannot directly determine the extraterritorial effect of a judgment by specifying that effect. Rather, the court can only determine the extraterritorial effect by specifying the effect within the state.¹⁹⁴ By disallowing the state to regulate directly the extraterritorial effects of its judgments, the Full Faith and Credit Clause and its implementing statutes discourage attempts by

189. *Container Corp.*, 463 U.S. at 176.

190. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985).

191. *Container Corp.*, 463 U.S. at 176.

192. *Phillips Petroleum*, 472 U.S. at 835 & n.15 (Scalia, J., dissenting) (citing cases).

193. 28 U.S.C. § 1738 (1988).

194. "[A] State is permitted to determine the extraterritorial effect of its judgments; but it may only do so indirectly, by prescribing the effect of its judgments within the State." *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 270 (1980) (plurality opinion).

one state to aggrandize its jurisdiction by making its judgments especially difficult to alter.

The universality requirement is consistent with such an approach. Under it, a legislature can give its statutes an extraterritorial effect only by giving effect to similar statutes enacted by other states. By tying the extraterritorial effect to the internal effect, the motivation for unnecessarily exerting state power is eliminated.

For example, suppose the legislature in State *X* decides that it wants most strongly to regulate corporations on the basis of the state of incorporation. If it passes a law regulating solely on the basis of the state of incorporation, that law will be entitled to extraterritorial effect. Suppose, however, that in attempting to aggrandize State *X*'s jurisdiction to prescribe, its legislature also sought to regulate those corporations that had more assets present in State *X* than in any other state. Under the universality requirement, passing such a statute would mean that another state's regulation on the basis of presence of assets would be entitled to respect within the courts of State *X*. This result would frustrate the attempt of State *X*'s legislature to regulate on the basis of incorporation, which the legislature believed to be the most important basis for regulation. Therefore, a rational legislature in State *X* would not adopt such a statute.

Legislation with a purported extraterritorial effect poses a problem fundamentally different from judicial decisions. Because it involves establishing rules that are intended to apply in other states, it avoids the check provided by the indirectness limitations imposed on state judgments. Without the check on the aggrandizement of state power posed by the rule that judgments have only the extraterritorial effect they possess inside the territory, legislatures may overreach.¹⁹⁵ Moreover, this type of legislation's effect is not confined to the parties to a particular judgment.

The Court has recognized that legislation presents issues different from recognition of judgments. "Full faith and credit does not here enable one state to legislate for the other or to project its laws across state lines so as to preclude the other from prescribing for itself the legal consequences of acts within it."¹⁹⁶

195. In addition, some Justices have suggested that a state has a stronger interest in protecting a judgment than such a statute. *Thomas*, 448 U.S. at 292-93 (Rehnquist, C.J., & Marshall, J., dissenting).

196. *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 504-05 (1939), quoted in *Nevada v. Hall*, 440 U.S. 410, 423-24 (1979). In *Pacific Employers*, a worker

In the case of statutes, the extra-state effect of which Congress has not prescribed, where the policy of one state statute comes into conflict with that of another, the necessity of some accommodation of the conflicting interests of the two states is still more apparent. . . .

. . . [T]he conflict is to be resolved, not by giving automatic effect to the full faith and credit clause, compelling the courts of each state to subordinate its own statutes to those of the other, but by appraising the governmental interests of each jurisdiction, and turning the scale of decision according to their weight.¹⁹⁷

This rule is akin to the governmental interest test adopted in ordinary conflict of laws cases.¹⁹⁸

While those ordinary conflict of laws cases did not adopt the conclusions presented here, they are consistent with the conclusions here because the cases dealt with legislation not intended to be exclusive.¹⁹⁹ Under such cases, our rule shows that it causes no problem to leave the choice to the plaintiff.

While this rule expands the limits that the Full Faith and Credit Clause imposes on state action, this expansion parallels the broadening of the Full Faith and Credit Clause in other areas. For example, in overruling earlier cases, the Court has held that a sister state judgment for taxes must be enforced.²⁰⁰ The Court also has enforced a judgment against a state, although neither the enforcing state's court nor the federal court could have handed down that very judgment.²⁰¹

3. *Jurisdiction to Adjudicate*

Changes in the Supreme Court's approach to personal jurisdiction are similarly consistent with our approach. Under the power theory, states can extend the scope of jurisdiction to prescribe by defining a ficti-

and employer agreed to apply Massachusetts law, but California was the situs of the accident. California was held able to apply its worker's compensation law.

While some have claimed that "in dealing with full faith and credit to statutes the Supreme Court in recent years has accorded no weight to language which purported to give a particular statute extraterritorial effect," Reese & Johnson, *The Scope of Full Faith and Credit to Judgments*, 49 COLUM. L. REV. 153, 162 (1949), quoted in *Thomas*, 448 U.S. at 271 n.15 (plurality opinion), this is not an invariable rule. See *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145, 153 (1932).

197. *Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532, 547 (1935).

198. The Court in *Thomas*, 448 U.S. at 279-80 (plurality opinion), also used a conflictual approach, comparing the strengths of state interests in foreclosing a second worker's compensation proceeding.

199. When a statute purports to have an extraterritorial effect, the statute's effect cannot be reduced by interpretation. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(1) (1971).

200. *Milwaukee County v. M.E. White Co.*, 296 U.S. 268 (1935).

201. *Nevada v. Hall*, 440 U.S. 410 (1979).

tious situs that would grant them power over the status or property. For example, a state could argue that the stock or bonds of a corporation incorporated in the state were present in the state for purposes of the power theory. Outside the corporate area, a state could claim that the domicile of one party to a marriage in that state gave the state jurisdiction to resolve issues arising out of that marriage.

The Court has limited such attempts. In *Shaffer v. Heitner*,²⁰² Delaware asserted jurisdiction to adjudicate by seizing stock, as authorized by its rule that the situs of ownership of stock is the state of incorporation. The rule was enforced by the posting of stop-transfer orders on the books of the corporation.²⁰³ Such a rule could be justified under the power theory by noting that the power to transfer the stock or to receive dividends and other benefits of shareholdership could only be enforced in Delaware, the domicile of the corporation.²⁰⁴ The Court, however, rejected Delaware's rule. Similarly, the Court rejected Wisconsin's much less unusual rule that a wife's domicile is that of her husband when the husband seeks custody of the children in a divorce and the wife and children live in another state.²⁰⁵ Finally, the Court allowed a state in which one party to a marriage was domiciled to grant a divorce,²⁰⁶ but not to

202. 433 U.S. 186 (1977).

203. *Id.* at 192.

204. This result would be entirely consistent with such cases as *Blackstone v. Miller*, 188 U.S. 189, 205 (1903), which held that the situs of the debt was the debtor. The Court allowed the state of the situs to tax the debt transfer. *But cf.* *Railroad Co. v. Pennsylvania* (The Case of the State Tax on Foreign-Held Bonds), 82 U.S. (15 Wall.) 300, 320 (1872) (a state of incorporation may not tax bonds issued by the corporation owned by non-residents and held out-of-state). Justice Holmes distinguished this case in his *Blackstone* opinion by stating, "The taxation in that case was on the interest on bonds held out of the State. Bonds and negotiable instruments are more than merely evidences of debt. The debt is inseparable from the paper which declares and constitutes it, by a tradition which comes down from more archaic conditions." *Blackstone*, 188 U.S. at 206. Justice Holmes cited his decision in *Bacon v. Hooker*, 177 Mass. 335, 337-38, 58 N.E. 1078, 1079 (1901), which discussed older cases holding that the existence of a sealed contract or executory deed depended on the existence of the documentary memorialization of the agreement or the deed. He continued in *Blackstone*, "Therefore, considering only the place of the property, it was held that bonds held out of the State could not be reached. The decision has been cut down to its precise point by later cases." *Blackstone*, 188 U.S. at 206. In one of these later cases, *Savings & Loan Soc'y v. Multnomah County*, 169 U.S. 421, 428 (1898), the Court held that a state could tax the mortgagee of property, although the mortgagee was domiciled in another state. The *Savings & Loan Society* Court explained that the conclusion in *State Tax on Foreign-Held Bonds* resulted from the Pennsylvania court's determination that the holder of the bonds had no property interest in Pennsylvania. *Id.* In *New Orleans v. Stempel*, 175 U.S. 309, 320 (1899), the Court permitted states flexibility in characterizing the situs of property when the property was not in the owner's physical possession.

205. *May v. Anderson*, 345 U.S. 528, 534 (1953).

206. *Williams v. North Carolina*, 317 U.S. 287 (1942).

resolve property issues or alimony in connection with the divorce.²⁰⁷

These cases do not expressly reject the power theory. However, limiting a state's power to characterize persons, property, or relationships as present within the state for the purposes of jurisdiction to adjudicate suggests that the Court would accept similar limits on a state's power for jurisdiction to prescribe. Particularly in *Shaffer*, the Court's result is inconsistent with past cases applying the power theory.

More generally, tests basing jurisdiction to adjudicate on power and territory, like *Pennoyer v. Neff*,²⁰⁸ have long been abolished in favor of tests based on convenience.²⁰⁹ The more recent cases hold that the reliance of *Pennoyer* on "territorial power . . . has been undermined."²¹⁰ The Supreme Court has held that the situs of property is no longer a sufficient basis for in rem jurisdiction.²¹¹ The rejection of the power theory and the Court's reliance on convenience in the area of jurisdiction to adjudicate these cases suggest that the Court is prepared to adopt similar principles in the area of jurisdiction to prescribe.

4. *The Rejection of the Law of the Situs in Federal Common Law Cases*

The power theory emphasized the role of the presence of property to determine which jurisdiction could prescribe. In some federal common law cases, the Supreme Court has rejected the test of presence for determining which law governs. This rejection emphasizes the Court's willingness to look to new principles to determine jurisdiction to prescribe.

The transition from older rules that relied on presence is notable in admiralty law. As the Supreme Court has observed, "The admiralty jurisdiction in tort was traditionally 'bounded by locality,' encompassing all torts that took place on navigable waters."²¹² More recently, however, the Supreme Court rejected a locality test to determine what torts are within the admiralty jurisdiction. In *Executive Jet Aviation, Inc. v.*

207. "[A] court cannot adjudicate a personal claim or obligation unless it has jurisdiction over the person of the defendant." *Vanderbilt v. Vanderbilt*, 354 U.S. 416, 418 (1957); see also *Estin v. Estin*, 334 U.S. 541, 548 (1948) (allowing the state of matrimonial domicile to determine alimony although another state could grant the divorce).

208. 95 U.S. 714 (1878).

209. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). See generally von Mehren & Trautman, *supra* note 17.

210. *Shaffer v. Heitner*, 433 U.S. 186, 197, 211 (1977).

211. *Id.*, overruling *Harris v. Balk*, 198 U.S. 215 (1905), noted in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 296 (1980).

212. *Nacirema Operating Co. v. Johnson*, 396 U.S. 212, 215 n.7 (1969) (citations omitted) (quoting *De Lovio v. Boit*, 7 F. Cas. 418, 444 (C.C.D. Mass. 1815) (No. 3776) (Story, J.)). As the Court there noted, Justice Story's opinion as Circuit Judge had been followed in *Insurance Co. v. Dunham*, 78 U.S. (11 Wall.) 1, 35 (1870).

City of Cleveland,²¹³ the Court held that the landing of a plane in navigable waters did not make the resulting lawsuits subject to admiralty jurisdiction, regardless of whether the accident was caused by negligence over the water or on the ground.²¹⁴ The Supreme Court has reaffirmed that holding, although deciding by a five-four vote that a collision between pleasure boats was within admiralty jurisdiction.²¹⁵ Similar transitions have occurred widely in state common law.²¹⁶

III. Conclusion

Corporations frequently have significant contacts with more than one jurisdiction. A corporation may be incorporated in one state, have its headquarters in another, the majority of its assets and employees in a third, and the majority of its shareholders in a fourth. Each of these states has a reasonable claim to the right to regulate the corporation. Conflicting state regulations create uncertainties for one attempting to comply with the relevant laws and raise some serious questions regarding state power to regulate in this area.

This Article has proposed a method for regulating those conflicts. Under our proposed approach, attempts to regulate transactions must meet a universality requirement, which provides that only those laws which could be applied by all states without a conflict would be valid.

This approach is a reasonable extension of past precedent to solve the novel problem of conflicting regulations of corporate transactions. Adopting the universality requirement will be beneficial in several respects. First, it will invalidate immediately some state assertions of jurisdiction to prescribe. This will eliminate the *in terrorem* effect of many state laws and end a number of potential conflicts.

Second, by identifying which assertions of jurisdiction to prescribe are overbroad, the universality requirement will encourage legislatures to set priorities. We expect that the process of setting priorities will eliminate many of these conflicts. In practice, the owners of shares are too diffuse in the case of corporations with distributed operations for share ownership by itself to be a likely way for legislatures to choose to govern corporations. In addition, mere presence of facilities will not satisfy the universality requirement. Consequently, states are likely to choose to

213. 409 U.S. 249 (1972).

214. *Id.* at 267.

215. *Foremost Ins. Co. v. Richardson*, 457 U.S. 668 (1982).

216. *See, e.g., Babcock v. Jackson*, 12 N.Y.2d 473, 477-89, 191 N.E.2d 279, 281-82, 240 N.Y.S.2d 743, 746-47 (1963) (discussing increasing reluctance to apply the law of the place of the tort).

regulate on the basis of the principal place of business or the state of incorporation. This will substantially reduce the number of conflicts.

An important advantage of the universality requirement is that it couples the procedure for legislation with a mechanism that deters attempts at aggrandizement of state power. The most problematic areas of jurisdiction to prescribe and jurisdiction to adjudicate have been those in which there is no effective political check on state assertions of jurisdiction. In the area of jurisdiction to adjudicate, the tendency of states to expand jurisdiction against non-residents to the limits allowed by the Constitution can be explained in part because this expansion merely disadvantages non-residents, who have no voting power. By contrast, abuses of states' jurisdiction to adjudicate against absent domiciliaries do not seem to have caused difficulties. Domiciliaries are entitled to vote, and their votes therefore present a check on arbitrariness against them. Similarly, the area of finality of judgments has caused relatively few problems, perhaps because the finality of a court's judgment out of the state is the same as the finality of its judgment in the state.

In the area of jurisdiction to prescribe, there has hitherto been no reason for a state to refrain from attempting to govern as many cases as possible by the values expressed in its laws.²¹⁷ Consequently, states have tended to expand, either judicially or legislatively, the number of cases that their laws govern. The expansions in power to adjudicate and to prescribe have reinforced one another: Because a state retains great flexibility to apply its own laws, the desire to have its substantive law govern encourages an assertion of jurisdiction to adjudicate.

A third advantage of the universality requirement is that it avoids any reference to territory. As an immediate advantage, this allows attention to be paid to the achievement of shared objectives of the states and parties.²¹⁸ In addition, by turning away from territory, the universality requirement suggests an approach to problems in the area of choice of

217. This expansion need not be the result of a mere desire to exert power. If judges tend to believe that the laws they administer are good, and one writer has defined the very existence of a system of laws as dependent on the existence of this belief, H.L.A. HART, *THE CONCEPT OF LAW* 112-13 (1961), they will tend to want to apply those laws in preference to the laws of other jurisdictions.

218. By contrast, much of the work in the area of conflict of laws still depends on rules developed for handling international conflicts for which there is no coordinating jurisdiction. See, e.g., *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 10 (1971); *id.* comment d (listing differences between conflicts involving international elements and those involving only jurisdictions within the United States; none of these deal with the availability of a coordinating entity in the United States). But cf. von Mehren, *Special Substantive Rules for Multistate Problems: Their Role and Significance in Contemporary Choice of Law Methodology*, 88 *HARV. L. REV.* 347, 349 (1974) (discussing choice of law among different communities).

law that are non-territorial, such as the relation of federal and state law, which have often been excluded from concern.²¹⁹

Our proposal has special implications for the regulation of corporate takeovers. First, it should reduce the number of conflicting claims of jurisdiction to prescribe and simplify the nature of the conflicts involved. This will make corporate takeovers easier. Second, the universality requirement, by allowing states to regulate on that basis of principal place of business if they so choose, may reduce the ability of corporations to incorporate in states attractive solely for their corporate law. This may be thought to be an undesirable characteristic of the rule we propose, because it promotes the balkanization of corporations law. However, the balkanization of corporations law has already been accomplished by the proliferation of statutes asserting jurisdiction on multiple grounds. The universality principle only minimizes the attendant difficulties. If it ultimately is concluded that there is a need for a nationally available corporations law, Congress can adopt one. Such a result is preferable to extending the Full Faith and Credit Clause to require other states to defer to legislation adopted by a state with little connection to either a corporation or its shareholders beyond the selection of its law.

219. A conflict between possibly applicable laws may arise in three cases: first, when it is a question whether the laws of one or of another state apply to a given legal situation; second, when it is a question whether earlier or later laws of the same state apply; third, in a federated nation, when it is a question whether the laws of the federation or of a member apply. The subject of Conflict of Laws is confined to questions of the first class.

RESTATEMENT OF CONFLICT OF LAWS § 1 comment c (1934). The primary difference between the first and second Restatements is that the Second Restatement is more explicit about what it excludes. It also describes the problems in terms of "territorial states having separate and differing systems of law." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 1 (1971). See also *id.* § 2 comment c (excluding from the scope of the Restatement federal-state conflicts, intrastate conflicts, conflicts of personal (non-territorial) law, conflicts in time, and criminal law). An exploration of the implications of these thoughts awaits another paper.

